79-1548

Supreme Court, U. S.
FILED
APR 3 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

IN RE: ESTATE OF PERRY CARLTON
DECEASED

ALBERTA CARLTON HAYES, RUCY C.
TEAGUE, CHARLES H. CARLTON, et al.,

Petitioners

v.

LUCY JANE CARLTON ROGERS,

Respondent

FLORIDA SUPREME COURT
CASE NO. 51,413

FLORIDA 4TH DCA
CASE NO. 75-1874

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PETITION FOR CERTIORARI

Petitioners, ALBERTA C. HAYES, RUBY C. TEAGUE, CHARLES H. CARLTON et al., pray that a Writ of Certiorari be issued to review a judgment of the Supreme Court of Florida and a judgment of an individaul thereof relating to judicial disqualification entered in IN RE: ESTATE OF PERRY

CARLTON, DECEASED, ALBERTA CARLTON HAYES et al., v. LUCY JANE CARLTON ROGERS, both dated January 10, 1980 (not yet reported). (Appended hereto on pages 105-124 of the Appendix.) Pursuant thereto, Justice Ben Overton declined to recuse himself and participated in the final determination, on Petition for Rehearing, of a Petition for Certiorari filed in the Florida Supreme Court by the Petitioners on direct-conflict grounds to review a decision of the District Court of Appeal, Fourth District, in Rogers v. Hayes et al., 348 So.2d 896 (Fla. App. 4th, 1977). The Petition for Certiorari was denied for lack of jurisdiction by a per curiam decision, with a strong dissenting opinion, dated March 8, 1979, (pages 46-61 of the Appendix) and Petition for Rehearing was denied on January 10, 1980 (page 125 of the Appendix). Both decisions were made by a sharply divided court (4-3) and are

not yet reported.

Petitioners requested and were granted a Stay by the Florida Supreme Court up to and including February 11, 1980, to allow Petitioners to seek review in the United States Supreme Court and to obtain any further stay from that Court. A copy of the Stay Order entered January 22, 1980, is incorporated as page 19 of the Appendix.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under Section 1257(3), Title 28, U.S.C., authorizing review of the judgment or decree of a state court "whereby any title, privilege, or immunity is specially set up or claimed" under the Constitution of the United States. Like all litigants, the Petitioners had a due-process right to have their cause heard by a fair and impartial tribunal. By virtue of the decisions of the Supreme Court and Justice

Overton dated January 10, 1980, referred to above, Justice Overton participated in the decision declining to take jurisdiction in a clear-cut case of direct-conflict certiorari, inviolation of Petitioners' right to a fair and impartial tribunal under the due process clause of the United States Constitution.

Moreover, under Section 4, Article V, Fla. Const., a litigant has a right to invole the jurisdiction of the Florida Supreme Court to review a decision of a District Court of Appeal that is in direct conflict with a decision of the Supreme Court of Florida on the same point of law. Thus, when our court of last resort declines, without opinion, to take jurisdiction to review a decision of a district court of appeal that is patently in direct conflict with a previous decision of the court, its action in this respect is not only a disservice to the Bench and the

Bar of this state in "muddying up" the waters in areas of the law; it is also a denial to that particular litigant of the constitutional right of review in direct-conflict cases granted by the Florida Constitution. And it seems clear that the Court's arbitrary failure and refusal to comply with the mandate of the Florida Constitution is a failure to comply with the "essential requirements of law" in violation of federal due-process guarantees.

QUESTIONS PRESENTED FOR REVIEW

QUESTION ONE

WHETHER DUE PROCESS REQUIRES A JUDGE TO DISQUALIFY HIMSELF BECAUSE OF A CLOSE, INTIMATE PERSONAL FRIENDSHIP WITH ONE OF THE ATTORNEYS IN A CASE IN WHICH HIS VOTE WOULD BE THE DECIDING VOTE IN A 4-3 DECISION AND OTHER SPECIAL CIRCUMSTANCES.

QUESTION TWO

WHETHER A COURT'S ARBITRARY DISREGARD OF A RIGHT GRANTED BY A STATE CONSTITUTION CONSTITUTES A DEPARTURE FROM THE ESSENTIAL REQUIREMENTS OF LAW SUFFICIENT TO

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QUESTION TWO

WHETHER A COURT'S ARBITRARY DISEGARD OF A RIGHT GRANTED BY A STATE CONSTITUTION CONSTITUTES A DEPARTURE FROM THE ESSENTIAL REQUIREMENTS OF LAW SUFFICIENT TO

VIOLATE A LITIGANT'S RIGHT TO DUE PROCESS OF LAW GUARANTEED BY THE UNITED STATES CONSITUTION.

CONSTITUTIONAL PROVISIONS INVOLVED

The right to trial by a fair and impartial tribunal is guaranteed by the due process clause of the Fourteenth Amendment to the United States Constitution, which says:

> . . . nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

And the Fifth Amendment to the United States Constitution says no person can be "deprived of life, liberty, or property without due process of law."

STATEMENT OF THE CASE

The basic litigation arose out of a controversy concerning the right of the Respondent, LUCY JANE CARLTON ROGERS, to inherit a portion of the estate of one

PERRY CARLTON, who died intestate on April 4, 1970, leaving only collateral descendants (nieces and nephews, great-nieces and -nephews, and one great-great niece) as his heirs at law to share his estate of some $3,000,000.00. The Petitioners are the heirs at law who are the blood relatives of the decedent. The Respondent was not related by blood to the decedent but was the adopted daughter of a brother of the decedent who predeceased the decedent.

In his Order of Determination of Heirs, dated September 26, 1975, the able Probate Judge (now a Justice of the Florida Supreme Court) relied on the decision of the Florida Supreme Court in In Re Hewett's Estate, 13 So.2d 904 (Fla. 1943) and similar cases in which it was held that an adopted child had no right under the Florida Statute of Descent and Distribution, Section 731.30, to inherit

intestate property from adoptive kindred other than his or her adoptive parents. A copy of the Order of September 26, 1975, is appended hereto as pages 1-11 of the Appendix.

On appeal, the District Court of Appeal, Fourth District, reversed Rogers v. Hayes et al., supra, 348 So.2d 896, appended hereto as pages 12-18 of the Appendix.

In due course, the Petitioners sought relief in the Florida Supreme Court of filing a Petition for Certiorari on direct-conflict grounds as authorized by Section 4, Atricle V, Fla. Const. The rocy road which this Petition traveled is relevant here: The Petition was denied on November 30, 1977, by a sharply divided court (4-3), with then Chief Justice Overton and Justices England, Sundberg, and Karl voting to deny relief, and Justices Adkins, Boyd, and Hatchett dis-

senting. On Petition for Rehearing, Justice Karl receded from his former decision denying review and joint the dissenters; and, in an order dated February 1, 1978, the order denying the Writ was vacated and the Writ was granted with oral argument set for April 11, 1978. Thereafter, but prior to oral argument, Justice Karl resigned from the Court and First District Court of Appeal Judge Woodrow Melvin was assigned to the Court as an Associate Justice replacing resigned Justice Karl. Almost a year after oral argument, the Court finally entered its order, dated March 8, 1979, quashing the Writ previously issued and dismissing the Petition on the ground that the Court was without jurisdiction. The Court was again divided, with Chief Justice England and Justices Overton, Sundberg, and Hatchett voting to dismiss the Petition,

and with a strong and comprehensive dissenting opinion by Senior Justice Adkins, concurred in by Justice Boyd and Associate Justice Melvin. (The Order of March 8, 1979, with dissenting opinion, is appended hereto as pages 46-61 of the Appendix.)

A Petition for Rehearing was filed on March 27, 1979, the Petitioners filed in the cause a Suggestion for the Disqualification of Justice Overton, a copy of which is appended hereto as pages 62-104 of the Appendix. The Petition pointed out the close personal relationship that existed between Justice Overton and the attorney who represented the Respondent in the trial court (and allegedly in the appellate proceedings, although not her attorney of record) and noted that Justice Overton, then Chief Justice, has assigned two judges from other districts (Judges Robert P. Smith, Jr., and Warren H. Cobb) to hear oral argument in the cause on the

appeal to the Fourth District Court of Appeal even though qualified judges of the Fourth District were available, and that it was these two assigned judges who decided the appeal in Rogers v. Hayes, supra, contrary to the Hewett decision, with the regualr Fourth District judge dissenting. It was stated that, in these circumstances, the Petitioners had cause to and did fear and believe that they had been denied a fair and impartial hearing in the Fourth District Court of Appeal and in the Supreme Court in violation of their due process rights under the provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States and Article 1, Sections 2 and 9, Declaration of Rights, Constitution of Florida, 1968 Revision, and that they will not receive a fair and impartial hearing by and before Justic Ben F. Overton and will be denied due process of law in the

event that he sits as a member of the Supreme Court of Florida upon its consideration of and determination of their Petition for Rehearing. (Their statements alleging violation of their federal constitutional rights are found on pages 79-80 of the Appendix.)

As noted above, the Suggestion for Disqualification was filed by the Petitioners on March 27, 1979, following the filing of their Petition for Rehearing on March 20, 1979. On January 10, 1980, the Supreme Court entered its Order in response to the Suggestion, receding from previous decisions of the Court in which suggestions for disqualification of one of its members had been ruled on by the Court, and holding that "each justice must determine for himself both the legal sufficiency of a request seeking his disqualification and the propriety of withdrawing in any particular circumstances."

(Pages 105-108 of the Appendix.) On that same date, Justice Overton filed in the cause his "Denial of Request for Recusal," finding that (1) the request for his disqualification was not timely filed and thus any right in this respect was waived by the Petitioners and (2) even if timely filed, a request for disqualification based on a friendship with an attorney in the cause was not legally sufficient to require disqualification. (Pages 109-124 of the Appendix.) Also on this same date, January 10, 1980, the Petitioners' Petition for Rehearing was denied by a divided court without opinion, with Chief Justice England and Justices Sundberg, Overton, and McDonald (who had replaced Justice Hatchett after his resignation to become a federal judge) constituting a majority in favor of denial, and Senior Justice Adkins, Justice Boyd, and Associate

Justice Melvin dissenting. (Page 125 of the Appendix.)

Petitioners were advised by the Clerk that the Court would not entertain any Petitions for Rehearing addressed to the decision of the Court authorizing Justice Overton to pass on his own qualifications and the unilateral action of Justice Overton in so doing. Application was then made to the Florida Supreme Court for a Stay of the mandate pending the filing of this Petition for Certiorari to the United States Supreme Court, which was granted to February 11, 1980. Application to this Court to continue the Stay of Mandate ordered by the Florida Supreme Court has been duly filed.

ARGUMENT

QUESTION ONE

WHETHER DUE PROCESS REQUIRES A JUDGE TO DISQUALIFY HIMSELF BECAUSE OF A CLOSE INTIMATE PERSONAL FRIENDSHIP WITH ONE

OF THE ATTORNEYS IN A CASE IN WHICH HIS VOTE WOULD BE THE DECIDING VOTE IN A 4-3 DECISION AND OTHER SPECIAL CIRCUMSTANCES.

Canon 3(C)(1) of Florida's Code of Judicial Conduct, adopted 1973, provides that:

> A judge should disqualifify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) he has a personal bias or prejudice concerning a party, . . .

It may be conceded that mere friendship with an attorney, standing alone, is insufficient to require a judge to recuse himself from participating in a case in which the attorney or his firm is interested. Ball v. Yates, 29 So.2d 729 (Fla. 1947); Ervin v. Collins, 85 So.2d 833 (Fla. 1956). But it is equally well settled that every litigant "is entitled to nothing less than the cold neutrality of an impartial judge." State ex rel. Mickle v. Rowe, 100 Fla. 1382, 131 So. 331 (1931);

State ex rel. Davis v. Parks, 141 Fla. 516, 194 So. 613 (1939); State ex rel. Jensen v. Cannon, 166 So.2d 625 (Fla. App. 3d 1964). The philosophy of the law of Florida in this respect was well set forth in State ex rel. Davis v. Parks, supra, 194 So. at 615. The opinion was authored by the late, very distinguished, Chief Justice Glenn Terrell, who served as a member of the Florida Supreme Court longer than any person in its 142-year history and who was, during his lifetime and since his death, revered as "Mr. Ingrity" of the Florida Supreme Court. In the opinion, Chief Justice Terrell said:

> "This Court is committed to the doctrine that every litigant is entitled to nothing less than the cold neutrality of an impartial judge. It is the duty of Courts to scrupulously guard this right and to refrain from attempting to exercise jurisdiction in any matter where his qualification to do so is seriously brought in question. The exercise of any other policy tends to discredit the judi-

ciary and shadow the administration of justice.

"It is not enough for a judge to assert that he is free from prejudice. His mien and the reflex from his court room speak louder than he can declaim on this point. If he fails through these avenues to reflect justice and square dealing, his usefulness is destroyed. The attitude of the judge and the atmosphere of the court room should indeed be such that no matter what charge is lodged against a litigant or what cause he is called on to litigate, he can approach the bar with every assurance that he is in a forum where the judicial ermine is everything that it typifies, purity and justice. The guaranty of a fair and impartial trial can mean nothing less than this.

"To force Relator to trial in face of the fear that the suggestion for disqualification warrants would be to impose on him a condition contrary to every principle devised for the administration of justice under our system of jurisprudence. There may in reality, be little basis for his fear but if it's there, the renunciation of the trial judge won't efface it. There is no reason why he should not and every reason why he sould recuse himself under the circumstances.

"The administration of justice is the most sacred rite known to the social order of a democracy. The duty of performing that rite is laid on the bench and bar. No greater commission was ever handed a profession but the same power that gave it can and will withdraw it if

we prostitute it. We can save our commission for posterity by thinking in terms of justice but we cannot save it by exalting the personal equation.

"It follows that the writ of prohibition as prayed for must be and is hereby granted."

In the "Denial of Request for Recusal," Justice Overton did not deny the allegations in the Suggestion for Disqualification, supported by affidavits of disinterested witnesses, that he stated that an attorney who represented the Respondent in the lower court (and allegedly still represents her although not an attorney of record in the appellate proceedings) was his best man at his wedding, handled his campaign when he was running for the Supreme Court, "is the best friend I ever had," and "we visit with each other back and forth." (Pages 70-71 of the Appendix.) This admittedly long-continued and actively close personal friendship must be considered in the

light of the special circumstances here present, referred to above--that is, a legal question that was decided on appeal by a divided appellate court (the two judges constituting the majority having been especially appointed by then Chief Justice Overton to sit during the hearing of the appeal in the instant case) in direct conflict with a decision of the Florida Supreme Court and subsequent decisions concerning the right of an adopted child to inherit from other than his or her adoptive parents, and in which jurisdiction to review the appellate court decision was denied by a divided (4-3) court per curiam without opinion on the first review and again, with a bare majority, on Petition for Rehearing. To paraphrase Chief Justice Terrell's statement in the Davis case, supra, 194 So. at 615,

> There may in reality, be little basis for (Petitioners') fear but if it's there, the renunciation of (Justice Overton) won't efface it. There is no reason why he should not and every reason why he should recuse himself under the circumstances.

The fact that the Suggestion for Disqualification was not filed until after Justice Overton's original participation in the case should not operate as a waiver at the appellate level--particularly where, as here, new justices participated in the cause upon each successive order in the case because of the resignations of two of the justices.

In all the circumstances here, it is respectfully submitted that due process of law requires that the Petitioners have their cause reviewed by the Supreme Court without the participation therein of Justice Overton.

QUESTION TWO

WHETHER A COURT'S ARBITRARY DISREGARD OF

A RIGHT GRANTED BY A STATE CONSTITUTION CONSTITUTES A DEPARTURE FROM THE ESSENTIAL REQUIREMENTS OF LAW SUFFICIENT TO VIOLATE A LITIGANT'S RIGHT TO DUE PROCESS OF LAW GUARANTEED BY THE UNITED STATES CONSTITUTION.

It is the responsibility of the Supreme Court of Florida under Section 4, Article V. Fla. Const., to resolve conflicts in the law resulting from conflicting decisions of a District Court of Appeal and the Florida Supreme Court. The Supreme Court's decision in In Re Hewett's Estate, supra, 13 So.2d 904, upon which the trial judge relied (Judge James Alderman, now a Florida Supreme Court justice), is appended hereto as pages 19-40 of the Appendix. It will be noted that the Supreme Court ruled clearly and unambiguously that the statute then in effect limited the inheritance of adopted children in intestate estates to the estate of the adoptive parents and that adopted children could

not participate in the intestate estate of the adoptive parents' ancestors "or other blood kin", 13 So.2d at 907. As pointed out in the dissenting opinion of Justice Adkins, subsequent decisions of the Supreme Court and of District Courts of Appeal have reaffirmed this ruling. (Pages 53-59 of the Appendix.) Thus, there is a direct conflict between this decision and that of the appellate court in Rogers v. Hayes, supra, 348 So.2d 896, creating confusion in this area of the jurisprudence of this state which the provisions for "direct conflict" certiorari review was designed to prevent. The Supreme Court's ruling, denying jurisdiction, leaves on rule of law prevailing in the Fourth District Court of Appeal, representing geographically only a few of Florida's sixty-seven counties, and a different rule of law as announced in the

Hewett case for the remaining counties of Florida. Such a condition is intolerable and not only unjust to the litigants here involved, but unfair to the practicing members of the Bar who will not know what the law is. [While the statute, Section 731.30, Fla. Stat., was amended in 1973, it may not have had the effect of changing the rule in Hewett because the statute, as amended, still does not "expressly make the adopted child the heir at law or lineal descendant of the ancestors or blood kindred of the adoptive parents." 27 University of Florida Law Review 1, at pages 12-13: The 1974 Florida Probate Code--A Marriage of Convenience (1975).]

In addition to failing to clarify the law in this important area of the law of descent and distribution, the Supreme Court's action in declining to take jurisdiction has left the Petitioners with

no remedy in the State courts. The duty of Justice Overton to recuse himself from participating in the decision on the Petition for Rehearing, in all the circumstances here present, cannot be gainsaid. Only then can the Petitioners be assured of having their cause considered by a fair and impartial tribunal. Justice Overton is protected by the doctrine of judicial immunity from personal liability for impinging upon Petitioners' right to a fair and impartial trial by declining to recuse himself, as are the other members of the court, constituting a majority, who declined to take jurisdiction of Petitioners' Petition for Certiorari in a clear case of direct conflict. While no decision on this point has been found, it is respectfully submitted that a denial of a litigant's right of review that is patent on the face of the record must

operated as a denial of due process of law within the spirit and intent of this constitutional guarantee which should be redressed to the same extent that other due-process of law denials are zealously protected and redressed by this Honorable Court. Equal justice under hte law, administered by impartial judges, is the keystone in the American system of jurisprudence.

Petitioners here do not seek a decision by the Supreme Court of the United States on the merits of the case but seek through this Petition a direction from the Supreme Court of the United States requiring the Supreme Court of Florida to here the matter on its merits or to decide the question of

jurisdiction by a court panel that does not include Justice Overton.

Respectfully submitted,

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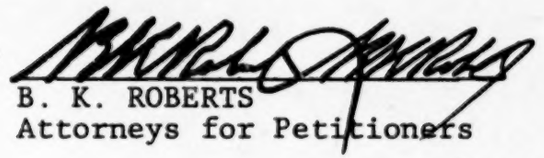
BY 
B. K. ROBERTS
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition and Appendix has been furnished to ROBERT JACKSON of Jackson & Clem, P.A., Post Office Box 2397, Vero Beach, Florida, 32960; JOHN T. BRENNAN of the Law Firm of Brennan, McAliley, Hayskar & McAliley, Post Office Box 3779, Fort Pierce, Florida 33450; ALBERTA CARLTON HAYES, Post Office Box 1781, Fort Pierce, Florida 33450; REUBEN W. CARLTON, Route 1, Box 714, Fort Pierce, Florida 33450; and, CHARLES H. CARLTON, 118 Sunrise Boulevard, Fort Pierce, Florida 33450, this 3rd day of April, 1980.

B. K. ROBERTS

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APPENDIX

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IN THE CIRCUIT COURT
OF THE NINETEENTH
JUDICIAL CIRCUIT, IN
AND FOR ST. LUCIE
COUNTY, FLORIDA

IN RE: ESTATE OF PERRY CARLTON, Deceased. / PROBATE DIVISION CASE NO. 70-75

DETERMINATION OF HEIRS

THIS CAUSE came on for trial on September 24, 1975, upon Petition for Determination of Heirs filed by Alberta Carlton Hayes, Ruby C. Teague and Charles H. Carlton. Having considered the testimony and evidence presented and the arguments of counsel, the Court makes the following findings of fact and conclusions of law.

Perry Carlton died intestate on April 4, 1970. He was not married and had no lineal descendants. His mother and father and all of his brothers and sisters predeceased him. He was survived by a number of nieces and nephews,

great-nieces and great-nephews, and one great-great-niece.

With one exception, there is no dispute or question as to the identity of the heirs-at-law of Perry Carlton. The disputed heir is Lucy Jane Carlton Rogers. Mrs. Rogers is the adopted daughter of Lindley L. (Lin) Carlton, who was a brother of Perry Carlton. Lindley L. (Lin) Carlton died in 1940, and at the time of his death had no children other than his adoptive daughter. If, under the law of Florida, Mrs. Rogers is an heir-at-law of Perry Carlton, his estate would be divided as follows:

NAME OF HEIR	RELATIONSHIP	PERCENTAGE OF ESTATE
1. Lucy Jane Carlton Rogers	Niece	20 %
2. Ruby C. Teague	Niece	10 %
3. Alberta C. Hayes	Niece	3 1/3 %

NAME OF HEIR	RELATIONSHIP	PERCENTAGE OF ESTATE
4. Charles H. Carlton	Nephew	3 1/3 %
5. Reuben W. Carlton	Nephew	3 1/3 %
6. Mary Elizabeth Carlton	Niece	3 1/3 %
7. Carl Carlton	Nephew	3 1/3 %
8. Dan S. Carlton	Nephew	10 %
9. Louise C. Whitice	Niece	10 %
10. Richard Carlton	Great-Nephew	3 1/3 %
11. Walter Carlton	Great-Nephew	3 1/3 %
12. Joanne Carlton Harton	Great-Niece	3 1/3 %
13. Charles T. Carlton	Great-Nephew	3 1/3 %
14. John W. Nelson	Great-Nephew	2 1/2 %
15. James O. Nelson	Great-Nephew	2 1/2 %
16. Harry W. Nelson	Great-Nephew	2 1/2 %
17. Sarah N. Vogel	Great-Niece	2 1/2 %

NAME OF HEIR	RELATIONSHIP	PERCENTAGE OF ESTATE
18. Sally Sue Sims Livergood	Great-Great Niece	10 %
		100 %

If Mrs. Rogers is not an heir-at-law of Perry Carlton, and not entitled to inherit from him, her share would be divided among the remaining heirs; their shares being increased proportionately.

The legal issue which the Court must determine is whether Mrs. Rogers is an heir-at-law of Perry Carlton, by virtue of her adoption by Perry Carlton's brother. This question must be determined as of April 4, 1970, because the rights of heirs became vested and fixed upon that date.

On April 4, 1970, the Florida Probate Law, Florida Statutes, Section 731.30, provided in part as follows:

"An adopted child, whether

> adopted under the laws of Florida, or of any other state or country, shall be an heir at law, and for the purpose of inheritance shall be regarded as a lineal descendant of his adopting parents, . . ."

At that time, the Florida Adoption Law, Florida Statutes, Section 63.151, also provided in part as follows:

> "By any judgment or decree of adoption the child shall be the child and legal heir of the adopting parent or parents, entitled to all rights and privilege and subject to all obligations, of a child born to such parent or parents in lawful wedlock."

It can reasonably be argued from the statutory language quoted above, that the Legislature intended to place an adoptive child within his or her adoptive family on the same basis as a natural child. It may also reasonably be contended that this statutory language, when read in conjunction with Florida Statutes, Section 731.23, which

specifies the mode of intestate succession, would allow inheritance between an adoptee and the full range of his or her adoptive kindred.

However, the Florida Supreme Court has taken a different view. In the case of In re Hewett's Estate, 13 So.2d 904, Fla. (1943), the Court, construing Section 731.30, Florida Statutes (1941), specifically held that within the adoptive family, intestate succession is strictly limited to inheritance by and from the adoptee and his or her adoptive parents. The only difference in the Statute, from 1943 to 1970, is that it was amended to allow inheritance by and from the adoptee and the other natural and adoptive children of the adoptive parent or parents.

In Hewett, the question was whether the adopted daughter of a first cousin of the deceased was entitled to share in

the estate to the same extent that her adoptive father would have shared had he been living. The Court held that she could not; that an adoptee could not inherit by intestacy from any other adoptive kindred other than his or her adoptive parents.

Exactly the same legal point is presented in the instant case where the question is whether Mrs. Rogers, the adopted daughter of Perry Carlton's brother, is entitled to share in his estate to the same extent that her adoptive father would have shared had he been living. Under the holding of the Supreme Court in the Hewett case, she would not.

The Court's holding in Hewett, and the consequences thereof, have been the subject of critical review. See: 24 University of Florida Law Review 603: Florida Adoption and Intestate Succession

Laws: A Legal Paralogism (1972). In 1973, the Legislature amended Florida Statutes, Section 731.30, to read in part as follows:

> "An adopted child, whether adopted under the laws of Florida, or of any other state or country, shall for the purposes of inheritance under the Florida Probate Law, be regarded as the natural issue of his adopting parents and shall inherit from and through his adopting parents. . ."

The amendment apparently was intended to change the rule of the Hewett case. A recent Law Review article questions whether this result was accomplished, because the new statute does not "expressly make the adopted child the heir at law or lineal descendant of the ancestors or blood kindred of the adoptive parents." See 27 University of Florida Law Review 1, at pages 12-31: The 1974 Florida Probate Code-A Marriage of Convenience (1975). However, that

question is not presently before the court and need not be decided here. This case must be determined upon the law as it existed on April 4, 1970.

Counsel for Mrs. Rogers argues that the Supreme Court incorrectly decided Hewett, and urges that this court "overrule" that decision and reach a different conclusion in this case. He overlooks the fact that the Circuit Court cannot "overrule" a decision of the Florida Supreme Court. This is true even where the Circuit Court disagrees with the previous holding of the Supreme Court. A different situation would be presented if this were a case of first impression, and if this court were not bound by the previous holding of the Florida Supreme Court.

Based upon the case of In re Hewett's Estate, supra, the Court concludes as a matter law that Lucy Jane Carlton Rogers,

the adoptive daughter of Lindley L. (Lin) Carlton, is not an heir-at-law of Perry Carlton. The Court determines the heirs-at-law of Perry Carlton, and their respective shares in the estate, to be as follows:

NAME OF HEIR	RELATIONSHIP	PERCENTAGE OF ESTATE
1. Ruby C. Teague	Niece	12 1/2 %
2. Alberta C. Hayes	Niece	4 1/6 %
3. Charles H. Carlton	Nephew	4 1/6 %
4. Rueben W. Carlton	Nephew	4 1/6 %
5. Mary Elizabeth Carlton	Niece	4 1/6 %
6. Carl Carlton	Nephew	4 1/6 %
7. Dan S. Carlton	Nephew	12 1/2 %
8. Louise C. Whitice	Niece	12 1/2 %
9. Richard Carlton	Great-Nephew	4 1/6 %

NAME OF HEIR	RELATIONSHIP	PERCENTAGE OF ESTATE
10. Walter Carlton	Great-Nephew	4 1/6 %
11. Joanne Carlton Harton	Great-Niece	4 1/6 %
12. Charles T. Carlton	Great-Nephew	4 1/6 %
13. John W. Nelson	Great-Nephew	3 1/8 %
14. James O. Nelson	Great-Nephew	3 1/8 %
15. Harry W. Nelson	Great-Nephew	3 1/8 %
16. Sarah N. Vogel	Great-Niece	3 1/8 %
17. Sally Sue Sims Livergood	Great-Great Niece	12 1/2 %
		100 %

DONE AND ORDERED at Fort Pierce, St. Lucie County, Florida, this 26th day of September, 1975.

Circuit Judge

In re ESTATE of Perry CARLTON,

Deceased.

Lucy Jane Carlton ROGERS, Appellant,

v.

Alberta Carlton HAYES, Ruby C. Teague, Charles H. Carlton, et al., Appellees.

No. 75-1874

District Court of Appeal of Florida, Fourth District

Jan. 14, 1977

Rehearing Denied March 25, 1977.

The Circuit Court, St. Lucie County, James E. Alderman, J., determined that adopted daughter of intestate's deceased brother was not an heir at law of intestate, and adopted daughter appealed. The District Court of Appeal, Smith, Robert P., Jr., Associate Judge, held that adopted daughter was a descendant of intestate deceased brother by virtue of statute requiring an adopted child to be regarded as a lineal descendant of his

adopting parents and, hence, adopted daughter, like other descendants of deceased brothers and sisters of intestate, was an heir at law of the intestate and entitled to share in his estate.

Reversed.

Cross, J., dissented.

Adoption 21

Adopted daughter of intestate's deceased brother was a descendant of brother by virtue of statute requiring an adopted child to be regarded as a lineal descendant of his adopting parents and, hence, adopted daughter, like other descendants of deceased brothers and sisters of intestate, was an heir at law of intestate and entitled to share in his estate. F.S. 1969, §§ 731.23(5), 731.30.

Robert Jackson, Law Offices of Jackson & Clem, Vero Beach, for appellant.

Raymond E. Ford, Fort Pierce, and John T. Brennan, Brennan, McAliley, Albury & Hayskar, Fort Pierce, for appellees.

SMITH, ROBERT P., Jr., Associate Judge.

Lucy Carlton Rogers appeals from a circuit court adjudication in the Estate of Perry Carlton, who died intestate April 4, 1970, that Lucy, adopted daughter of the intestate's deceased brother Lindley, is not an heir at law of the intestate. At the instance of nieces, nephews and others claiming through deceased nieces and nephews, the circuit court held that Lucy's claim is foreclosed by the Supreme Court's decision in In re Hewett's Estate, 153 Fla. 137, 13 So.2d 904 (1943), and that legislation expanding the rights of adopted children since 1941, the critical date in Hewett,

does not affect the result.[1]

At the times relevant in Hewett and in the present case the order of devolution of an intestate's property was provided by §731.23, F.S., in relevant part

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[1] Sec. 72.06, F.S. 1941, provided that an adopted child "shall be declared the child and heir-at-law of the person applying for his adoption." In 1943 the Legislature added that the adopted child shall be "entitled to all rights and privileges . . . of a child born to such parent or parents in lawful wedlock." Ch. 21759. §16, Fla. Laws 1943; as further amended, §63.151, F.S. 1969. Further legislation in 1973 and 1975, which is not arguably applicable to the present case, created the same "relationship between the adopted person and the petitioner and all relatives of the petitioner that would have existed if the adopted person were a legitimate blood descendant of the petitioner." Sec. 63.172(c), F. S. 1975. See also §731.30, F.S. 1973.

as follows:

> "(5) If there is none of the foregoing [no surviving spouse lineal descendants or parent], to the brothers and sisters and the descendants of deceased brothers and sisters.
>
> "(6) If there is none of the foregoing, the estate shall be divided into moieties, one of which shall go to the paternal and the other to the maternal kindred in the following course:
>
> "(b) If there is no grandfather or grandmother, to the uncles and aunts and the descendants of such of them as may be deceased."

In rejecting Lucy's claim as the adopted daughter of Perry Carlton's brother, the circuit court in this case resolved the controversy on the principal if not the only theory there submitted by Lucy, namely, that legislation intervening since 1941 reversed the result in Hewett, supra, n. 1, 13 So.2d 904. We sustain Lucy's claim as a matter of law, but by another route.

The Court in Hewett held that the claimant, though by statute the heir at law and lineal descendant of her adoptive father, §§ 72.06, 731.30, F.S. 1941, could not claim to be a descendant of her father's mother Thankful Collwell, the deceased aunt of the intestate. The Hewett court rejected claimant's argument.

> "that an adopted child could not 'for the purpose of inheritance be regarded as a lineal descendant of its adopting parents' without also being regarded as the lineal descendant of its adopting parents' ancestors . . .." 13 So.2d at 906.

Therefore, the Hewett claimant was not among the "descendants of such . . . deceased [uncles and aunts]," to whom the estate passed by operation of §731.23(6)(b), F.S. 1941, supra.

In the present case the question is not whether statutes have made an adopted child the descendant of her father's

ancestors but rather whether statutes have made an adopted child a descendant of her father, that is to say, a descendant of the deceased brother of Perry Carlton, the intestate. Sec. 731.23(5), F.S. 1969, supra. Sec. 731.30, F.S. 1941 and 1969, providing that the adopted child "shall be regarded as a lineal descendant of his adopting parents," plainly had that effect, as was recognized by the court in Hewett, 13 So.2d at 907. It follows that appellant Lucy Carlton Rogers, like the other descendants of deceased brothers and sisters of Perry Carlton, was entitled to share in his intestate estate.

REVERSED.

COBB, WARRENT H., Associate Judge, concurs.

CROSS, J., dissents.

In re HEWETT'S ESTATE

Supreme Court of Florida, Division B.

June 8, 1943.

1. Adoption 21

In determining whether adopted child of intestate's deceased cousin is entitled to participate in intestate's estate to extent that her adoptive father would have participated had he lived, expression of legislative will in effect at date of intestate's death is controlling. F.S.A. §§ 731.23(6)(b), 731.30.

2. Adoption 21

Statute declaring adopted child to be lineal descendant of adopting parents for purposes of inheritance did not make adopted daughter of intestate's deceased first cousin "descendant" of intestate's aunt within meaning of statute providing for descent of property of an intestate to uncles and aunts and descendants of

such of them as may be deceased in absence of grandparents. F.S.A. §§ 731.23 (6)(b), 731.30.

See Words and Phrases, Permanent Edition for all other definitions of "Descendant".

3. Constitutional law 70(1)

The court cannot add anything to statute not expressly stated therein or which is not necessarily implied by language used.

4. Statutes 225

Statute declaring an adopted child lineal descendant of its adooting parents for purpose of inheritance and statute relating to order of succession to property of an intestate should be construed in "pari materia ". F.S.A. §§ 731.23, 731.30.

See Words and Phrases, Permanent Edition, for all other definitions of "Pari Materia".

5. Adoption 21

Statute providing that adopted child

inherits from its adopting parents and from its natural parents cannot be construed as disclosing legislative intent to give adopted child right to inherit from adopting parents' ancestors or other blood kin. F.S.A. § 731.30.

6. Adoption 21

The words "heir at law" and "for the purpose of inheritance be regarded as a lineal descendant", as used in statute providing that an adopted child shall be an heir at law, and for purpose of inheritance be regarded as a lineal descendant of its adopting parents, are limited by words "of its adopting parents", precluding a construction which would read into statute the words "and their ancestors", following the words "of its adopting parents." F.S.A. §731.30.

See Words and Phrases, Permanent Edition, for all other definitions of "Heir at Law".

7. Descent and distribution 25

Under policy of statutes of descent or succession to place emphasis upon kinship as established by blood stream, word "descendants" as used in statute of descents and distributions connotes those persons who are in blood stream of ancestor. F.S.A. § 731.23.

A "descendant" is one who descends, as offspring, however remotely, or an individual proceeding from an ancestor in any degree, issue; offspring, near or remote, progeny.

8. Adoption 21

When strangers to blood come into family by legal adoption, they have only such rights of inheritance as are given them by statute.

9. Adoption 21

Aunt and first cousin of intestate each of whom predeceased intestate had no interest in his estate which could be claimed by adopted daughter of cousin even if she were considered a descendant of aunt.

Appeal from Circuit Court, Pinellas County; T. Frank Hobson, Judge.

Proceeding in the matter of the estate of William B. Hewett, deceased, on claim of Lila Colwell, the adopted daughter of William B. Colwell, a deceased first cousin of decedent, for interest which her adoptive father would have been entitled to had he survived decedent, opposed by Laura Conklin and Etta Ferguson, first counsins and surviving kindred of decedent. From a judgment of

circuit court reversing order of probate court denying claim, opponents appeal.

Reversed and remanded.

Carey & Harrison, of St. Petersburg, for appellant.

Joe W. Davis, of St. Petersburg, for Walter Stamper, administrator of the estate of William B. Hewett.

Fred T. Saussy, of St. Petersburg, for appellee, Lila Colwell.

BROWN, Justice.

This is a case of first impression in this jurisdiction. It concerns the degree or extent of inheritability of an adopted child as regards the estates of lineal or collateral kindred of the adoptive parent or parents.

William B. Hewett died May 14, 1941. He had made a will leaving all of his estate to his wife, but she died shortly before he did. So it is agreed that in effect he died intestate. He left

surviving him no father or mother, no child or children, no brother or sister, nor the descendants of a deceased brother or sister, no grandparents and no uncles or aunts. So far as known to the trial court, his surviving kindred consisted of two first cousins, Laura Conklin and Etta Ferguson, the appellants herein. Then there was Lila Colwell, the adopted daughter of William B. Colwell, a deceased first cousin of William B. Hewett's estate, i.e., that she was entitled to recover from the assets of the Hewett estate the same interest which her adoptive father would have been entitled to had he been living at the time of the death of William B. Hewett.

William B. Colwell and Mrs. Etta Ferguson were the children of Thankful Hewett Colwell, who was a paternal aunt of William B. Hewett. Mrs. Laura Conklin is the daughter of another

paternal aunt of William B. Hewett, whose name was Sophronia Hewett. If these two aunts had been living at the time of William B. Hewett's death, his estate would have descended to them under Sec. 24 of the Probate Act of 1933, F.S. A. § 731.23, but they both predeceased William B. Colwell and he predeceased William B. Hewett.

The Probate Judge, after taking testimony as to the facts, entered an order denying Lila Colwell's claim, and on appeal the Circuit Court reversed said order. The Judges of both these courts carefully considered this controversy, as shown by their very persuasive opinions, but, as above shown, they reached opposite conclusions. Laura Conklin and Etta Ferguson appealed from the Circuit Court's judgment to this court. On this appeal we have the benefit of the well prepared briefs of counsel for the

respective parties.

The question involved is not free from difficulty, as is often the case when dealing with questions turning upon the interpretation of statutory provisions. In the light of the facts of this case the controlling question might be briefly stated in these words: Is the adopted daughter of William B. Colwell, the deceased first cousin of William B. Hewett, entitled to share in the estate of William B. Hewett to the same extent that her adoptive father would have shared had he been living at the time of William B. Hewett's death?

[1] Our old adoption statute (ch. 3594, Acts of 1885, sections 5076-5081, C.G.L., sections 72.01 to 72.06, Fla. Stats. 1941, F.S.A. §§ 72.01 to 72.06) contains a provision to the effect that any child adopted thereunder "shall be declared the child and heir at law of

the person applying for his adoption." The same rule was made to apply to a child legally adopted in another state. Sec. 5488, C.G.L. The Probate Act of 1933, section 31, now appearing as section 731.30, Fla. Stats. 1941, F.S.A. § 731.30, being the last expression of the legislative will, is controlling here. It reads as follows:

> "Adopted child.--An adopted child whether adopted under the laws of Florida or any other state or country, shall be an heir at law and for the purpose of inheritance be regarded as a lineal descendant of its adopting parents and the adopting parents shall inherit from the adopted child. Such adopted child shall inherit the estate of its blood parents, but such blood parents shall not inherit from such adopted child."

Section 24, subsection 6(b), of the Probate Act of 1933, being subsection 6(b) of section 731.23 of Fla. Stats. 1941, F.S.A. § 731.23, reads:

> "Order of succession.--The real and personal property of an intestate shall descend and be

distributed as follows: * * *

"6(b) If there be no grandfather or grandmother, to the uncles and aunts and the descendants of such of them as may be deceased."

William B. Colwell, the adoptive father of claimant Lila Colwell, was the son of a deceased aunt of William B. Hewett, and admittedly a "descendant" of such aunt within the plain meaning of the statute. The question here is whether upon the death of Hewett, William B. Colwell's adopted daughter, he having predeceased William B. Hewett, was also a "descendant" of Hewett's deceased aunt. Manifestly she was not, unless section 31 of the Probate Act, now section 731. 30 of Fla. Stats. 1941, F.S.A. § 731.30, made her so.

[2] That section of the statute provides that an adopted child "shall be an heir at law and for the purpose of inheritance be regarded as a lineal

descendant of its adopting parents," etc. (emphasis supplied.) So the statute does not expressly make the adopted child the heir at law or lineal descendant of the ancestors or blood kindred of the adoptive parents. Can we reasonably hold that it impliedly does so? We think not.

[3] It is argued that an adopted child could not "for the purpose of inheritance be regarded as a lineal descendant of its adopting parents" without also being regarded as the lineal descendant of its adopting parents' ancestors, but the statute says nothing about the adopting parents' ancestors and we cannot add anything to the statute which is not expressly stated therein or which is not necessarily implied by the language used. Can it be said that the implication contended for is necessarily and reasonably implied from the language used?

[4] The learned Circuit Judge thought so. His view was that the above quoted section 31 of the Probate Act, insofar as an adopted child is concerned, was a legislative definition of the word "descendants" as used in paragraph 6, subsection (b), and wherever such word appeared in said section 24, thus placing an adopted child in exactly the same position for purposes of inheritance as a natural child would have occupied. He also called attention to the fact that the words "for the purpose of inheritance" is not qualified by any such words as from "its adopting parents." But that the word "inheritance" is used in an unrestricted sense. We agree that sections 24 and 31 (731.23 and 731.30, Fla. Stats. 1941, F.S.A. §§ 731.23, 731.30) should be construed in para materia, but those provisions of section 24 (the general statute of descents and distributions) which

limit the distribution of inheritances to "descendants" must not be changed by anything contained in section 31 except insofar as the language of that section either expressly or by necessary implication requires. We think that the use of the words, "and for the purpose of inheritance be regarded as a lineal descendant of its adopting parents" might well have been prompted by the words immediately following, which are, "and the adopting parents shall inherit from the adopted child," which would only be appropriate if the child be regarded "as a lineal descendant of its adopting parents." This purpose is further shown by the next sentence, which provides that while the adopted child shall also inherit from its blood parents, the "blood parents shall not inherit from such adopted child." We might well say that what

the legislature mainly had in mind in drafting this section was the extent and quality of an adopted child's inheritance from both its adopting parents and its natural parents, and the reciprocal right of inheritance from the adopted child -- which latter right was given exclusively to the adopting parents, just the same as if the adopted child were "for the purpose of inheritance" regarded "as the lineal descendant of its adopting parents", which adopting parents assume the burden and legal duty of raising, training, educating and supporting the adopted child, and thus relieving the blood parents of this burden and expense.

[5,6] This statute is very liberal in its provisions in behalf of the adopted child. Such child inherits from its adopting parents as if it were their own natural child, and likewise inherits from its natural parents. Why should the

legislature be construed to have gone further and intended, by court-imposed implication, to give the adopted child the right to inherit from the adopting parents' ancestors or other blood kin? The legislature should not be construed to have intended this unless the language of the statute makes it plain that such was the legislative intent--which we do not think it does. The statute says: "An adopted child * * * shall be an heir at law, and for the purpose of inheritance be regarded as a lineal descendant of its adopting parents * * *." So the words "heir at law" and "for the purpose of inheritance be regarded as a lineal descendant" are all limited and qualified by the words "of its adopting parents". We would be going too far if we should expand the language of this sentence to read: "of its adopting parents and their ancestors."

[7,8] Statutes of descent or succession usually place emphasis upon kinship as established by the blood stream -- hence the frequent use of the word "descendants" in our own statute of descents and distributions, now section 731.23, Fla. Stats. 1941, F.S.A. § 731.23. The word "descendants" connotes those persons who are in the blood stream of the ancestor. And when strangers to the blood come into the family by legal adoption they have only such rights of inheritance as are given them by statute.

A descendant, says Webster, is one who descends, "as offspring, however remotely". The Century Dictionary defines the word as "an individual proceeding from an ancestor in any degree, issue; offspring, near or remote," and Worcester says it means "the offspring of an ancestor; progency." See Words and Phrases, Permanent Edition, vol. 12, p. 220.

In 1 Am. Jur. 662, Sec. 63, it is said: "The right of an adopted child to inherit as an heir of the relatives or descendants of the adoptive parents depends entirely upon statutory or constitutional provisions. And while these statutes, though similar, have not received a uniform construction, yet it is the general view that there is not conferred upon the child a right to inherit from the lineal or collateral kindred of the adoptive parent unless the language of the statutes is clearly to that effect."

See also 2 C.J.S., Adoption of Children, § 63, p. 455, and a very comprehensive review of the decisions in an annotation in 38 A.L.R., beginning at page 8. This annotation follows an interesting opinion in the case of In re estate of Bradley, 185 Wis. 393, 201 N.W. 973, 38 A.L.R. 1. In that case it was held that a statute which interrupts the natural

course of the descent of property should be strictly construed. In Warren v. Prescott, 84 Me. 483,24 A. 948, 17 K,R,A, 435, 30 Am. St. Rep. 370, the court went so far as to hold that, although by adoption the adopters can make for themselves an heir, they cannot thus make one for their kindred. And in Merritt v. Morton, 143 Ky. 133, 136 S.W. 133, 33 L.R.A., N.S., 139, it was held as the adopted child's right to inherit rested upon contract only those who were parties to the contract are bound by it.

One of the general lines of reasoning upon which many of the decisions are based is expressed in Phillips v. McConica, 59 Ohio St. 1, 9, 51 N.E. 445, 447, 69 Am. St. Rep. 753, as follows:

"The ancestors of the adopter are presumed to know their relatives by blood, and to have them in mind in the distribution of their estates, either by will or

descent, but they cannot be expected to keep informed as to adoption proceedings in the probate courts of the counties of this state; and to allow an adopted child to inherit from the ancestors of the adopter would often put property into the hands of unheard of adopted children, contrary to the wishes and expectations of such ancestors."

See also, on this general question, the opinions of Justice Lamm in Hockaday v. Lynn, 200 Mo 456, 98 S.W. 585, 8 L.R.A., N.S., 117, 118 Am. St. Rep. 672, 9 Ann. Cas. 775, a very scholarly historical treatment of this subject of adoption and its effect on the general laws of descent and distribution; also Helms, Adm'r v. Elliott, 89 Tenn. 446, 14 S.W. 930. 10 L.R.A. 535; Shoemaker v. Newman, 62 App. D.C. 120, 65 F.2d 208, 89 A.L.R. 1034; Kettell v. Baxter, 50 Misc. 428, 100 N.Y.S. 529 (Cited and quoted from an

annotation in 38 A.L.R., p. 9, wherein many other cases are reviewed).

[9] It will have been noted from the statement of facts herein that William Colwell, the adoptive parent of Lila Colwell, never did have any interest in the estate of William Hewett, having died prior to Hewett's death. So it is that if Lila Colwell is to have a share in Hewett's estate, she can only acquire it upon the theory that she is a descendant of the Thankful Hewett Colwell, the deceased aunt of Hewett and who had departed this life before Hewett died. As above indicated the applicable provisions of our Florida statutes do not support this theory. They do recognize the relatioship of father and daughter, set up by the adoption proceedings, between William Colwell and Lila Colwell, but they do not make Lila Colwell the granddaughter of Thankful Hewett Colwell, to whom she was

entirely unrelated. But by this decision of the case Lila Colwell is losing nothing, since neither she nor her adoptive father, nor her adoptive father's mother, ever had any interest in William B. Hewett's estate, both of the latter having predeceased him.

For these reasons, the judgment appealed from is reversed and the cause remanded for further proceedings not inconsistent with the above opinion.

BUFORD, C.J., and THOMAS and SEBRING, JJ., concur.

SUPREME COURT OF FLORIDA

WEDNESDAY, NOVEMBER 30, 1977

IN RE: ESTATE OF PERRY CARLTON, DECEASED	)	
ALBERTA CARLTON HAYES, et al,	)	
Petitioners,	)	CASE NO. 51,413
vs.	)	DCA CASE NO. 75-1874
LUCY JANE CARLTON ROGERS,	)	
Respondent.	)	

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

OVERTON, C.J., ENGLAND, SUNDBERG and KARL, JJ., Concur ADKINS, BOYD and HATCHETT, JJ., Dissent

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

IN THE SUPREME COURT OF FLORIDA

WEDNESDAY, FEBRUARY 1, 1978

IN RE: ESTATE OF PERRY CARLTON DECEASED. **

**

ALBERTA CARLTON HAYES, ET AL., **

Petitioners, **

vs. **

LUCY JANE CARLTON ROGERS, **

Respondent. **

**

ORDER GRANTING REHEARING AND WRIT OF CERTIORARI

CASE NO. 51,413

DCA Case No. 75-1874

The petition for rehearing is granted and the Clerk is directed to issue the Writ and set the cause down for oral argument.

The Petition herein for a Writ of Certiorari to the District Court of Appeal, Fourth District of Florida, is granted and the cause is hereby set down for oral argument at 9:30 a.m. TUESDAY,

APRIL 11, 1978. A maximum of 20 minutes to the side is allowed but counsel is expected to use only so much of that time as is necessary.

The Court has tentatively accepted jurisdiction of this case; however, the parties should be prepared to argue the jurisdictional issue should the question be raised by the Court.

The Clerk of the District Court of Appeal, Fourth District, shall file the original record on or before February 27, 1978; the petitioners' brief shall be filed on or before February 27, 1978; the respondent's brief shall be filed on or before March 14, 1978; and petitioners' reply brief shall be filed on or before March 21, 1978. Please file an original and seven copies of all briefs. UNLESS BRIEFS ARE TIMELY FILED, THE PRIVILEGE OF ORAL ARGUMENT WILL BE FORFEITED.

NO CONTINUANCES WILL BE GRANTED EXCEPT UPON A SHOWING OF EXTREME HARDSHIP.

ADKINS, BOYD, HATCHETT and KARL, JJ., concur OVERTON, C.M. ENGLAND and SUNDBERG, JJ., dissent

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

SUPRME COURT OF FLORIDA

THURSDAY, MARCH 8, 1979

In Re: Estate of PERRY CARLTON, Deceased	*	
ALBERTA CARLTON HAYES, et al.,	*	CASE NO. 51,413
Petitioners,	*	DCA, FOURTH
v.	*	DISTRICT 75-1874
LUCY JANE CARLTON ROGERS,	*	
Respondent.	*	

* * * * * * * * * * * * * * *

The Petition for Writ of Certiorari reflected probable jurisdiction in this Court. We issued the Writ and have heard argument of the parties. After hearing argument and upon further consideration of the matter, we have determined that the Court is without jurisdiction. Therefore, the Writ must be and is hereby discharged and the Petition for Writ of Certiorari is dismissed.

It is so ordered.

ENGLAND, C.J., OVERTON, SUNDBERG and HATCHETT, JJ., Concur ADKINS, J., Dissents with an opinion, with which BOYD, J. and MELVIN, Associate Justice, Concur

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

ADKINS, J. Dissenting.

I dissent from the majority.

Justice James Alderman, while a circuit judge, found that Lucy Rogers, the adopted daughter of the intestate's deceased brother, Lindley Carlton, was not an heir at law of the intestate. The order contained the following:

> The legal issue which the Court must determine is whether Mrs. Rogers is an heir-at-law of Perry Carlton, by virtue of her adoption by Perry Carlton's brother. This question must be determined as of April 4, 1970, because the rights of the heirs became vested and fixed upon that date.
>
> On April 4, 1970, the Florida Probate Law, Florida Statutes, Section 731.30, provided in part as follows:
>
> > "An adopted child, whether adopted under the laws of Florida, or of any other state or country, shall be an heir at law, and for the purpose of inheritance shall be regarded as a lineal descendant of his adopting parents ..."
>
> At that time, the Florida Adoption Law, Florida Statutes, Section 63.151, also provided in part as follows:

"By any judgment or decree of adoption the child shall be the child and legal heir of the adopting parent or parents, entitled to all rights and privileges and subject to all obligations, of a child born to such parent or parents in lawful wedlock."

It can reasonably be argued from the statutory language quoted above, that the Legislature intended to place an adoptive child within his or her adoptive family on the same basis as a natural child. It may also reasonably be contended that this statutory language, when read in conjunction with Florida Statutes, Section 731.23, which specifies the mode of intestate seccession, would allow inheritance between an adoptee and the full range of his or her adoptive kindred.

However, the Florida Supreme Court has taken a different view. In the case of In re Hewett's Estate, 13 So.2d 904, Fla. (1943), the Court, construing Section 731.30, Florida Statutes (1941), specifically held that within the adoptive family, intestate succession is strictly limited to inheritance by and from the adoptee and his or her adoptive parents. The only difference in the Statute, from 1943 to 1970, is that it was amended to allow inheritance by and from the adoptee and the other natural and adoptive children of the adoptive parent or parents.

In Hewett, the question was whether the adopted daughter of a first cousin of the deceased was entitled

to share in the estate to the same extent that her adopting father would have shared had he been living. The Court held that she could not; that an adoptee could not inherit by intesacy from any other adoptive kindred other than his or her adoptive parents.

Exactly the same legal point is presented in the instant case where the question is whether Mrs. Rogers, the adopted daughter of Perry Carlton's brother, is entitled to share in his estate to the same extent that her adoptive father would have shared had he been living. Under the holding of the Supreme Court in the Hewett case, she would not.

The district court of appeal reviewed this order and attempted to distinguish Hewett, supra, observing that the claimant in Hewett, though an heir-at-law and lineal descendant of his adopted father, could not claim to be a descendant of his adopted father's mother. The court distinguished Hewett because in the case sub judice the claimant was a descendant of the deceased brother of the intestate. She was therefore a lineal descendant of her adopted parent and entitled to share

in the estate.

In Hewett, this Court said the claimant could not participate in the estate of the ancestors, "or other blood kin," Id. at 907, but the district court in the case sub judice held the claimant could participate in the estate of the blood kin. This is clear conflict.

The fact that inclusion of the "blood kin" in the rule enunciated by the Hewett court may be considered dictum does not prevent the Court from taking jurisdiction. Twomey v. Clausohm, 234 So.2d 338 (Fla. 1970).

On the merits, I would adopt the reasoning of the Court in Hewett, when the Court said:

> We might well say that what the legislature mainly had in mind in drafting this section was the extent and quality of an adopted child's inheritance from both its adopting parents and its natural parents, and the reciprocal right of inheritance from the adopted child -- which latter right was given exclusively

> to the adopting parents, just the same as if the adopted child were "for the purpose of inheritance" regarded "as the lineal descendant of its adopting parents", which adopting parents assume the burden and legal duty of rasing, training, educating, and supporting the adopted child, and thus relieving the blood parents of this burden and expense.
>
> This statute is very liberal in its provisions in behalf of the adopted child. Such child inherits from its adopting parents as if it were their own natural child, and likewise inherits from its natural parents. Why should the legislature be [construed] to have gone further and intended, by court-imposed implication, to give the adopted child the right to inherit from the adopting parents, ancestors, or other blood kin? [Emphasis added.] The legislature should not be construed to have intended this unless the language of the statute makes it plain that such was the legislative intent -- which we do not think it does. The statute says: "An adopted child *** shall be an heir at law, and for the purpose of inheritance be regarded as a lineal descendant of its adoping parents***." So the words "heir at law" and "for the purpose of inheritance be regarded as a lineal descendant" are all limited and qualified by the words "of its adopting parents." We would be going too far if we should expand the language of this sentence to

read: "of its adopting parents and their ancestors."

53 Fla. 137; 13 So.2d 904, 906-07 (1943).

The ruling of Hewett has, in effect, been reaffirmed in subsequent decisions of this Court and district courts of appeal that either followed it or distinguished it on the facts. Thus, in In re Poole's Estate, 153 Fla. 610; 15 So.2d 323 (1943), this Court relied on Hewett in ruling that the next of kin of the deceased wife of an intestate decedent who died without lineal descendants or blood relatives were entitled to inherit his estate rather than his adoptive cousins. And in In re Levy's Estate, 141 So.2d 803, 804 (Fla. 2d DCA 1962), by ruling that section 731.30 did not cut off the preexisting right of an adopted child to inherit from collateral blood kindred, the Court reaffirmed the rule of Hewett that "the word 'descendants' can-

notes those persons who are in the blood line of the ancestor" and that the strangers who are adopted into the family "have only such added rights of inheritance as are given by statute." The Court noted also that the 1953 amendment to section 731.30, enacted after the decision in Hewett,

> would not change the result of that case. It does enhance the inheritance rights of an adoptee to permit him to inherit from his adoptive brothers and sisters -- but no further.

141 So.2d at 805. In re Levy's Estate, supra, was considered by the Court in Gessner v. Powell, 238 So.2d 101 (Fla. 1970), in disposing of an alleged conflict between the decision in that case and that of a district court of appeal ruling that an adopted minor child had no cause of action for the wrongful death of his natural father. In discharging the writ because no conflict, in fact, existed,

this Court said:

> The statement in In re Levys, supra, that the adoption statute does not "limit or take away rights already in existence" must be interpreted in context, namely, with respect to the right of adoptees to inherit from blood relatives as well as from their adoptive parents and adoptive brothers and sisters as expressly authorized by § 731.30, Fla. Stat. 1969.

Gessner v. Powell, 238 So.2d at 102. (Emphasis supplied). Most recently, in In Re Estate of Wight, 263 So.2d 258 (Fla. 2d DCA 1972), the trial court's denial of the right of an adopted child to inherit from an intestate adoptive cousin was per curiam affirmed on authority of Hewett.

The following appears in Atkinson on Wills, section 23 at 89 (2d ed. 1953):

> Most courts have not been so liberal to the adopted child with respect to his inheritance from the ancestors or collateral kin of the predeceased adoptive parent. Thus, when intestate left a niece of the blood of one brother and a nephew by adoption of another brother, the latter took no interest in the estate. The theory of this decision is that

> while one may make a child his own by adoption, he cannot make him the relative of other persons by the same process. No doubt this is the prevailing view.

Decisions involving the right of an adopted child to inherit under the will of an adoptive parent's ancestor or other blood kindred in varying circumstances have distinguished Hewett and, in effect, reaffirmed it as to intestate estates. Thus, in In re Baker's Estate, 172 So.2d 268, 269 (Fla. 2d DCA 1965), the court noted that it was held in Hewett that:

> Under the then applicalbe statute, an adopted child could not "inherit" from lineal or collateral kindred of the adoptive parent. This is the general rule followed by most jurisdictions. 1 Am. Jur. 2d, Adoption § 106; 2 C.J.S. Adoption of Children § 63d; Annot., 43 A.L.R. 2d 1183 (1955).

In affirming the ruling of the trial court that the "Hewett doctrine" was inapplicable to the facts in Baker, the court said:

> In the instant case the appellee does not "inherit" the legacy from the testatrix. She takes as a

> lineal descendant of the legatee, by force of the anti-lapse statute, F.S.A. § 731.20. This is the position taken by other courts who have been presented with the question. 19 A.L.R. 2d 1159, at page 1165.

172 So.2d 268, 270 (Fla. 2d DCA 1965).

Similarly, in First National Bank of Miami v. Bobcik, 132 So.2d 299 (Fla. 3d DCA 1961), involving the right of an adopted child to the principal of a testamentary trust as the "living descendant" of the beneficiary (her adoptive father) upon his death, the court emphasized that the adopted child did not take as the "heir or descendant of the testatrix" but because she "fits the description of the person who the will provides shall receive the principal of the fund" after the death of the beneficiary.

The Court's interpretation in Hewett of the legislative policy with respect to the rights of adoptees to inherit intestate property was not unique; it was the

policy of almost every jurisdiction in this country under similar statutes to limit the right of inheritance of an adopted child, as to intestate property, to the estate of the adoptive parents. In an annotation in 43 A.L.R. 2d 1185 (1955), concerning the rights of inheritance of an adopted child, the annotator states at page 1189 that:

> Under statutes expressly providing in substance that the child shall be entitled to inherit or take property by succession from, or shall be "to all intents and purposes" the heir of, the adopting parent, but making no mention of inheritance or succession from kindred of such parent, it has been with great regularity that no right to inherit or take from kindred of the parent is conferred.

The many decisions cited and reviewed in support of the statement involved various classes of collateral kindred, including the parents, brother, sisters, and cousins of an adopting parent. One reason for this policy was expressed in Gamble v. Cloud, 82 So.2d 526, 528 (Ala. 1955).

> To accept the view of appellant is to hold that an adoptive parent may not only make another his heir, but he can also make an heir to his collateral kin without their knowledge and consent. There are many cases which refuse to accept such a construction of their statute... The authorities are legion and the arguments all strongly oppose a different theory of construction.

Accord, Merritt v. Morton, 143 Ky. 133, 136 S.W. 133 (1911); Warren v. Prescott, 84 Me. 483, 24 A. 948 (1892); (both cases cited in Hewett). Another reason for this policy, mentioned in Hewett, quoting Phillips v. McConica, 59 Ohio St. 1, 51 N.E. 445 (1898), was as follows:

> "The ancestors of the adopter are presumed to know their relative by blood, and to have them in mind in the distribution of their estste, either by will or descent, but they cannot be expected to keep informed as to adoption proceedings in the probate courts of the counties of this state; and to allow an adopted child to inherit from the ancestors of the adopter would often put property into the hands of unheard of adopted children, contrary to the wishes and expectations of such ancestors."

But, for whatever reason, the fact remains that the legislature had not seen fit to provide expressly that adoptees shall have the right to inherit the intestate property of an ancestor or other blood kin of the adopting parents, even though it must have known that no such right existed under the statute as interpreted in Hewett. (Amendments to the Probate Code made in 1973, 1974, and 1975 may have had that effect; however, those statutes are not relevant here and should not, of course, be interpreted by this Court in these proceedings.) And it is respectfully submitted that, in these circumstances, a judicial interpretation of the statute as it existed in 1970 that would be contrary to the interpretation made in Hewett would constitute judicial amendment of the statute.

In my opinion the decision of the district court of appeal should be quashed

and the cause remanded with instructions to reinstate the order of the circuit judge.

BOYD, J. and MELVIN, Associate Justice, Concur

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

IN RE: ESTATE OF PERRY CARLTON, DECEASED

ALBERTA CARLTON HAYES, RUBY C TEAGUE, CHARLES H. CARLTON, et al.,

Petitioners,

vs.

LUCY JANE CARLTON ROGERS,

Respondent.

SUGGESTION FOR DISQUALIFICATION
OF JUSTICE OF SUPREME COURT

Pursuant to Sections 38.02 and 38.10, Florida Statutes, F.S.A., and 32 West's F.S.A. Code of Judicial Conduct, Canon 3, Subdivision C (1), ALBERTA CARLTON HAYES, CHARLES H. CARLTON, and REUBEN W. CARLTON, deceased, in their own proper persons, respectfully suggest to this Honorable Court that Justice BEN F. OVERTON disqualify himself or be disqualified from sit-

ting as a member of the Court and participating in any consideration, determination, or action of the Court upon the pending Petition for Rehearing, filed herein on or about the 20th day of March, 1979, upon the following grounds:

1. That said Justice is interested in the result thereof because of his extremely close association and friendship with BENJAMIN A. BITTAN, JR., Esquire, a member of the law firm of WILLES, BITTAN & WILLES, Fort Pierce, Florida, the actual attorneys from the Respondent, LUCY JANE CARLTON ROGERS, although not presently her attorneys of record herein.

2. That the said ALBERTA CARLTON HAYES, CHARLES H. CARLTON, and REUBEN W. CARLTON fear that they will not receive a fair trial or hearing upon said Petition for Rehearing in this Court before Justice BEN F. OVERTON, as a member of

this Court, on account of the bias and prejudice of said Justice BEN F. OVERTON against the Petitioners and in favor of the adverse Respondent because of his extremely close association with BENJAMIN A. BITTAN, JR., Esquire, a member of the law firm of WILLES, BITTAN & WILLES, Fort Pierce, Florida, the actual attorneys for the Respondent, LUCY JANE CARLTON ROGERS, although not presently her attorneys of record herein.

3. That the facts and reasons for their belief that such bias and prejudice exists are as follows:

(a) The trial Court entered its Order, dated September 26, 1975, in which it found as a matter of law that LUCY JANE CARLTON ROGERS, the adoptive daughter of LINDLEY (LIN) L. CARLTON (the natural brother of PERRY CARLTON, deceased), who died in 1940, some three years before the case of <u>In Re Hewett's</u>

Estate, 13 So.2d 904 (Fla. Sup. Ct., 1943) was decided; and that the decision of the trial Court, among other authorities, was based upon the case of In Re Hewett's Estate, supra.

(b) LUCY JANE CARLTON ROGERS, Respondent, took an appeal from said Order of the trial Court on October 22, 1975, to the District Court of Appeal of Florida, Fourth District; that not until the 16th day of November, 1976, was oral argument had upon said appeal; and that said appeal was decided, not by regular members of the District Court of Appeal of Florida, Fourth District, but by two members of a three-judge panel assigned to said Appellate Court by Justice BEN F. OVERTON, as Chief Justice of the Supreme Court of Florida, and Judge SPENCER C. CROSS of the District Court of Appeal of Florida, Fourth District, who dissented without a dissenting opinion.

(c) The two members assigned by then Chief Justice BEN F. OVERTON to the District Court of Appeal of Florida, Fourth District, on the 21st day of September, 1976, to hear this appeal were ROBERT P. SMITH, JR., a Judge of the District Court of Appeal of Florida, First District, Tallahassee, Florida, and WARREN H. COBB, as an Associate Judge, of Daytona Beach, Florida, a Circuit Judge of the Seventh Judicial Circuit of Florida, as shown by Orders attached hereto and made a part hereof as Exhibit Nos. 1 and 2; that the assignment of these two Judges, both well known to Justice BEN F. OVERTON, from distant sections of the State of Florida and outside the geographical area of the Fourth District Court of Appeal of Florida, when other Judges of the Fourt District Court of Appeal of Florida, and from the geographical area of the Fourth District Court of Appeal of

Florida, were available, causes Petitioners herein to believe and to fear that they were not accorded due process under the Constitution of Florida, and the Constitution of the United States, but, on the contrary, were not given a fair and impartial hearing upon said appeal by fair and impartial Judges.

(d) Judge ROBERT P. SMITH, JR., led the attack upon Appellee-Petitioners' oral arguments by numerous questions and made a show of leaving the Bench at the beginning of Appellee-Petitioners' oral argument to get "that book", meaning Volume 13 of Southern Reporter, 2d Series, containing the Opinion in In Re Hewett's Estate, supra, as though he was entirely unfamiliar with the Opinion in said case, and returning with it to the Courtroom, as shown in Exhibit No. 3, attached hereto and made a part hereof; and that the judgment of the trial Court was reversed

on the 17th day of January, 1977, in an Opinion written by Judge ROBERT P. SMITH, JR., who was joined therein by Associate Judge WARREN H. COBB. Judge SPENCER C. CROSS of the Fourth District Court of Appeal of Florida, as Presiding Judge, dissented from said Opinion.

(e) Neither the Petitioners nor their counsel knew of the assignment by Chief Justice BEN F. OVERTON of Judge ROBERT P. SMITH, JR., or Associate Judge WARREN H. COBB to the Fourth District Court of Appeal of Florida prior to their appearance before the Court for oral argument on the 16th day of September, 1976, and had no opportunity to challenge their service on the Fourth District Court of Appeal of Florida upon this particular appeal.

(f) Subsequently, a Petition for a Writ of Certiorari was filed in the Supreme Court of Florida to review said

Opinion of the Fourth District Court of Appeal of Florida, together with jurisdictional briefs and portions of the record; the Petition for a Writ of Certiorari was based upon the obvious conflict of the Opinion of the Fourth District Court of Appeal of Florida in this cause with the Opinion in In Re Hewett's Estate, supra. On the 30th day of November, 1977, in a 4-3 decision, Justices ADKINS, BOYD, and HATCHETT, dissenting, the Supreme Court of Florida entered its Order denying jurisdiction.

(g) A Petition for Rehearing was filed on or about the 12th day of December, 1977, in the Supreme Court of Florida; on the 1st day of February, 1978, the Supreme Court of Florida entered its Order granting Petitioners' Petition for a Writ of Certiorari, issuing the Writ and setting the case for oral argument at 9:30 o'clock a.m., on Tuesday, the 11th

day of April, 1978; and, upon said Order, Justice ADKINS, BOYD, HATCHETT, and KARL concurred as a majority.

(h) Hearings set for oral argument before the Court for 9:30 o'clock a.m., on the 11th day of April, 1978, were continued, on said date, until the afternoon of the 11th day of April, 1978, due to the Investiture of Justice JAMES E. ALDERMAN, as a Justice of the Supreme Court of Florida.

(i) After the Investiture of Justice JAMES E. ALDERMAN, and in the Supreme Court Building, Chief Justice BEN F. OVERTON, knowing the Petitioner, CHARLES H. CARLTON, to be an heir of PERRY CARLTON, deceased, spoke to him and the following conversation, essentially, took place between them:

"OVERTON: How is everything in Fort Pierce?

C.H.C. : Fine, Mr. Justice.

OVERTON: How is my old friend, Bert Bittan?

C.H.C. : Fine, Sir.

OVERTON: He called me yesterday and said that due to the terrible tragedy in the offices of Willes, Bittan & Willes (the death of William F. Willes), he would not be able to attend the Investiture of Justice ALDERMAN, here, today.

C.H.C. : Yes, it was a terrible tragedy. We were sorry to hear about it.

OVERTON: You know, Bert Bittan is the best friend I ever had. We went to law school together. He was my best man at my wedding. He handled my campaign down there when I was running for the Supreme Court. We visit with each other back and forth."

This conversation took place in the Courtroom of the Supreme Court Building. Shortly thereafter, in the hall immediately opposite the North door of the lawyers' lounge where the reception for Justice ALDERMAN was being held, Chief Justice BEN F. OVERTON repeated his statements hereinabove set forth to Petitioner, CHARLES H. CARLTON, Attorneys EDGAR A. BROWN, VINCENT A. LLOYD, and RAYMOND E. FORD, all of Fort Pierce, Florida, and others, almost verbatim, as shown in affidavits attached hereto and made a part hereof as Exhibits Nos. 3, 4, 5, and 11.

(j) Oral arguments were heard in this case before the Supreme Court of Florida on the afternoon of the 11th day of April, 1978, and Petitioners, therefore, had no opportunity to challenge Chief Justice BEN F. OVERTON from sitting on the case, as a member of the Court, on that date.

(k) Without considering the merits of the case, as set forth in the Petition for a Writ of Certiorari supporting briefs and oral arguments on the 11th day of April, 1978, this Court, by a 4-3 decision, determined that it was without jurisdiction and dismissed the Petition for a Writ of Certiorari on the 8th day of March 1979. The majority Opinion was voted by ENGLAND, C. J., OVERTON, SUNBERG, and HATCHETT, JJ. Justice ADKINS in an able Dissenting Opinion, in which he was joined by Justice BOYD and Associate Justice MELVIN, found that there was clear conflict between the Opinion of the Fourth District Court of Appeal of Florida herein and the Opinion of this Court in the Hewett case, supra, and, further, found that "a judicial interpretation of the Statute as it existed in 1970 that would be contrary to the interpretation made in Hewett would constitute

judicial amendment of the statutes." On the question of conflict jurisdiction, only the vote of Justice HATCHETT, of the original Justices of the Court issuing the Writ of Certiorari, was changed in favor of the Respondent, LUCY JANE CARLTON ROGERS.

(l) Petitioners have reason to believe and do believe and fear that the decision made by the majority of the Court, in its Order dated on the 8th day of March, 1979, was, in fact, made prior to the 8th day of March, 1979. Unusually, but no coincidentally, the news media announced the fact that Justice HATCHETT headed a Federal Justice Department list for a seat on the United States Fifth Circuit Court of Appeals, that the State of Florida would receive two or three appointments to the United States Fifth Circuit Court of Appeals of the eleven (11) vacancies available, and that Judge

ROBERT P. SMITH, JR., who wrote the Opinion of the Fourth District Court of Appeal of Florida herein was also on the Federal Justice Department list of persons being considered for appointment to the United States Fifth Circuit Court of Appeals, by state wide publication in the press on the very same date of March 8, 1979, as shown by Exhibit No. attached hereto and made a part hereof.

(m) The law firm of WILLES, BITTAN & WILLES, of Fort Pierce, Florida, are the real attorneys for the Respondent, LUCY JANE CARLTON ROGERS, herein, although ROBERT JACKSON, Vero Beach, Florida, is the nominal attorney of record for the Respondent, as is shown by the following instruments, attached hereto and made a part hereof, as Exhibits Nos. 7, 8, 9, 10, and 11:

1. Petition for appointment of Administrator, filed April 15, 1970;

2. Affidavit of ERROL S. WILLES, dated April 17, 1970, and filed April 17, 1970;
3. Complaint in the case of RICHARD P. KENNEY, IN PRO PER, Plaintiff vs. LUCY JANE CARLTON ROGERS, Defendant, Case No. 76-726-CA, St. Lucie County, Florida;
4. Deposition of RICHARD P. KENNEY, Attorney at Law, Miami, Florida, taken upon oral examination on the 18th day of August, 1976;
5. Affidavit of RAYMOND E. FORD, Esquire, of Counsel for Petitioners herein.

(n) Attorney BENJAMIN A. BITTAN, JR., personally and actively participated in the representation of LUCY JANE CARLTON ROGERS and the FIRST NATIONAL BANK OF FORT PIERCE, Fort Pierce, Florida, as Administrator of the Estate of PERRY CARLTON, deceased, as shown by his sworn

testimony given by deposition upon oral examination on the 1st day of February, 1979. A copy of said deposition is attached hereto and made a part hereof as Exhibit No. 12.

4. That a Petition for Rehearing is now pending before the Supreme Court of Florida upon its determination in its Order, dated March 8, 1979, that said Court is without jurisdiction to review the decision of the Fourth District Court of Appeal of Florida, reversing the judgment of the tiral Court which held that LUCY JANE CARLTON ROGERS was not an heir of PERRY CARLTON, deceased, that the Writ be discharged and that the Petition for Certiorari be dismissed.

5. That, for the foregoing reasons, the undersigned Petitioners and heirs at law of PERRY CARLTON, deceased, in their proper persons, have cause to believe and fear and do believe and fear that Justice

BEN F. OVERTON of the Supreme Court of Florida is biased and prejudiced against them; that he is biased and prejudiced in favor of the Respondent, LUCY JANE CARLTON ROGERS; that they have not received a fair and impartial hearing and determination of the appeal from the judgment of the trial Court to the Fourth District Court of Appeal of Florida, as aforesaid; that they have not received a fair and impartial hearing or consideration of their Petition for a Writ of Certiorari herein by and before Justice BEN F. OVERTON; and that they will not receive a fair and impartial hearing by and before Justice BEN F. OVERTON in the event that he sits as a member of the Supreme Court of Florida upon its consideration of and determination of their pending Petition for Rehearing herein.

6. That, for the foregoing reasons, the undersigned Petitioners and heirs at

law of PERRY CARLTON, deceased, in their proper persons, have cause to believe and fear and do believe and fear that they have been denied due process of law in the appeal to the Fourth District Court of Appeal of Florida, from the judgment of the trial Court herein; that they have been denied due process of law before Justice BEN F. OVERTON upon their Petition for a Writ of Certiorari to the Supreme Court of Florida; that they will be denied due process of law by and before Justice BEN F. OVERTON in the event that he sits as a member of the Supreme Court of Florida upon its consideration of and determination of their pending Petition for Rehearing herein; that due process of law required that each tribunal be a fair and impartial one; that impartiality is lacking where a member thereof is biased and prejudiced in favor of the Respondent and against the Peti-

tioners; that a denial of due process of law violates the rights of the Petitioners under the provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States and Article 1, Sections 2 and 9, Declaration of Rights, Constitution of Florida, 1968 Revision; and that they and other blood relatives of PERRY CARLTON, deceased, making a total of seventeen (17) heirs at law will herein be denied the right to possess and protect their properties in the Estate of PERRY CARLTON, deceased, and they will be deprived of their properties, in an amount in excess of $600,000.00 to Respondent, LUCY JANE CARLTON ROGERS, from a gross estate valued at about $3,600,000.00, of the Estate of PERRY CARLTON, deceased, without due process of law.

DATED on this 26th day of March, 1979.

ALBERTA CARLTON HAYES

REUBEN W. CARLTON

CHARLES H. CARLTON,
Petitioners and heirs of
PERRY CARLTON, deceased,
In Proper Person

STATE OF FLORIDA)
)
COUNTY OF ST. LUCIE)

Before me, a Notary Public, in and for the State of Florida, an officer duly authorized to administer oaths, personally appeared ALBERTA CARLTON HAYES, REUBEN W. CARLTON, and CHARLES H. CARLTON, who, being first duly sworn, deposed, and said: That they are blood relatives and

heirs at law of PERRY CARLTON, deceased; that they, and each of them, have read and understand the allegations contained in the foregoing Suggestion for Disqualification of Justice of Supreme Court in the above styled cause; and that said allegations are true and correct to the best of their knowledge and belief.

ALBERTA CARLTON HAYES

REUBEN W. CARLTON

CHARLES H. CARLTON

Sworn to and subscribed before
me at Fort Pierce, Florida, on
this 26th day of March, 1979.

Notary Public, State of Florida at Large

My commission expires: _____

STATE OF FLORIDA)
)
COUNTY OF ST. LUCIE)

Before me, a Notary Public in and for the State of Florida at Large, an officer duly authorized to administer oaths, personally appeared CHARLES H. CARLTON, who, being first duly sworn, deposed, and said: That he has signed and sworn to the foregoing Suggestion for Disqualification of Justice of Supreme Court; that he has placed a true copy thereof in a suitable envelope addressed to Robert E. Jackson, Esquire, of Jackson & Clem, Post Office Box 2397, Vero Beach, Florida 32960, bearing the requisite amount of U.S. Postage; that he has deposited said envelope in the U.S. Mail Depository provided therefor at the U.S. Post Office in Fort Pierce, Florida, on the 26th day of March, 1979; that he has furnished true copies of said

Suggestion to Raymond E. Ford, Esquire, and to John T. Brennan, Esquire, Brennan, McAliley, Hayskar & McAliley, Attorneys at Law, 519 South Indian River Drive, Fort Pierce, Florida, by manual delivery, on the 26th day of March 1979; and that he has furnished a true copy thereof to the Honorable B. K. Roberts, Esquire, of Roberts, Miller, Baggett & LaFace, Attorneys at Law, 203 South Adams Street, Tallahassee, Florida, by manual delivery, on the 27th day of March, 1979.

_____
CHARLES H. CARLTON,
Petitioner and heir at law of PERRY CARLTON, deceased.

Sworn to and subscribed before me at Fort Pierce, Florida, on the 27th day of March, 1979.

_____
Nortary Public, State of Florida at Large

My commission expires: _____

SUPREME COURT OF FLORIDA
TALLAHASSEE

WHEREAS, it has been officially made known to me that it is necessary to the dispatch of business of the Fourth District Court of Appeal of Florida that a judge be temporarily assigned to duty in that court.

NOW, THEREFORE, I, BEN F. OVERTON, under authority vested in me as Chief Justice of the Supreme Court of Florida, under Section 2, Article V, of the Constitution of Florida, and the rules of this Court promulgated thereunder, do hereby assign and designate The Honorable Robert P. Smith, Jr., a judge of the First District Court of Appeal, of the State of Florida, to proceed to the Fourth District Court of Appeal of Florida, and thereupon, on the 15th day of November, 1976, and thereafter through the 17th day of November, 1976, to hear, conduct, try, and

determine the cause or causes which shall be presented to him as a temporary judge of said court, and thereafter to dispose of all matters considered by him on said date or dates. The said Robert P. Smith, Jr., under and by virtue of the authority hereof, is hereby vested with all and singular the powers and prerogatives conferred by the Constitution and laws of the State of Florida upon a judge of the court to which he is hereby assigned.

DONE AND ORDERED at Tallahassee, Florida, this 21st day of September, 1976.

_____
CHIEF JUSTICE
SUPREME COURT OF FLORIDA

ATTEST:

_____
CLERK

SUPREME COURT OF FLORIDA
TALLAHASSEE

WHEREAS, it has been officially made known to me that it is necessary to the dispatch of business of the Fourth District Court of Appeal of Florida that a judge be temporarily assigned to duty in that court.

NOW, THEREFORE, I, BEN F. OVERTON, under authority vested in me as Chief Justice of the Supreme Court of Florida, under Section 2, Article V, of the Constitution of Florida, and the rules of this Court promulgated thereunder, do hereby assign and designate The Honorable Warren H. Cobb, a judge of the Seventh Judicial Circuit, of the State of Florida, to proceed to the Fourth District Court of Appeal of Florida, and thereupon, on the 15th day of November, 1976, and thereafter through the 17th day of November, 1976, to hear, conduct, try, and determine the cause or causes which shall be presented to him as a temporary judge of said court, and thereafter to dispose of all matters considered by him on said date or dates. The said Warren H. Cobb, under and by virtue of the authority hereof, is hereby vested with all and singular the powers and prerogatives conferred by the Constitution and laws of the State of Florida upon a judge of the court to which he is hereby assigned.

DONE AND ORDERED at Tallahassee, Florida, this 28th day of September, 1976.

_____
CHIEF JUSTICE
SUPREME COURT OF FLORIDA

ATTEST:

_____
CLERK

AFFIDAVIT

STATE OF FLORIDA)
)
COUNTY OF ST. LUCIE)

Before me, a Notary Public in and for the State of Florida, an officer duly authorized to administer oaths, personally appeared CHARLES H. CARLTON, of Fort Pierce, Florida, who, being first duly sworn, deposed, and said: That he is a blood relative and an heir at law of PERRY CARLTON, deceased; that there are a total of seventeen (17) blood relatives of PERRY CARLTON, deceased, who are heirs at law of PERRY CARLTON, deceased; that he has been cognizant of the progress of the administration of the Estate of PERRY CARLTON, deceased, since its beginning; that on the 16th day of November, 1976, he accompanied Attorneys Raymond E. Ford and John T. Brennan to the Fourth District Court of Appeal of Florida, West Palm

Beach, Florida, and heared the oral arguments upon the appeal taken by LUCY JANE CARLTON ROGERS, from the judgment of the Circuit Court of St. Cucie County, Florida, determining that LUCY GANE CARLTON ROGERS was not an heir at law of PERRY CARLTON, deceased; that he was wholly surprised to find that Judge ROBERT P. SMITH, JR., of the First District Court of Appeal of Florida, and Associate Judge WARREN H. COBB, of Dayton Beach, Florida, were sitting on the case; that the oral arguments were made for the Appellant by Robert Jackson, Vero Beach, Florida, and by John T. Brennan and Raymond E. Ford for the Appellees; that Errol S. Willes and William F. Willes, of the law firm of WILLES, BITTAN & WILLES, Fort Pierce, Florida, were present and sitting in the audience during the oral arguments; that Judge ROBERT P. SMITH, JR., led the attack against counsel for Appellees during

the oral argument; that Judge ROBERT P. SMITH, JR., made a show of leaving the Bench to get "that book", meaning Volume 13 of the Southern Reporter, 2nd Series, in which the Hewett case is reported, and returning to the Bench with it; that, prior to the opening of oral arguments on the appeal, Errol S. Willes and William F. Willes came from the North end of the building and Errol S. Willes stated that they had been back there in the offices talking with a Judge or Judges; and that it was obvious from his actions that Judge ROBERT P. SMITH, JR., had met Errol S. Willes and William F. Willes and knew who they were as they sat in the audience during the oral arguments.

Affiant further says that he was present in the Supreme Court Building, Supreme Court of Florida, Tallahassee, Florida, on the 11th day of April, 1978, to hear oral arguments upon the Petition

for a Writ of Certiorari, filed by numerous blood relatives as heirs of PERRY CARLTON, deceased; that such oral arguments were docketed to be heard at 9:30 o'clock a.m., on the 11th day of April, 1978; that such oral arguments were continued until the afternoon of April 11, 1978, due to the Investiture of Justice JAMES E. ALDERMAN as a member of the Supreme Court of Florida; that, after the Investiture, Chief Justice BEN F. OVERTON approached him in the Courtroom and the following conversation took place between them:

"OVERTON: How is everything in Fort Pierce?

C.H.C. : Fine, Mr. Justice.

OVERTON: How is my old friend, Bert Bittan?

C.H.C. : Fine, Sir.

OVERTON: He called me yesterday and said that due to the terrible tra-

gedy in the offices of Willes, Bittan & Willes (the death of William F. Willes), he would not be able to attend the Investiture of Justice ALDERMAN, here, today.

C.H.C. : Yes, it was a terrible tragedy. We were sorry to hear about it.

OVERTON: You know, Bert Bittan is the best friend I ever had. We went to law school together. He was my best man at my wedding. He handled my campaign down there when I was running for the Supreme Court. We visit with each other back and forth.";

that, after leaving the Courtroom to attend the reception for Justice ALDERMAN, he joined Attorneys Raymond E. Ford, Edgar A. Brown, and Vincent Lloyd, all of Fort Pierce, Florida, in the hall immediately opposite the North door of the

lawyers' lounge where the reception was being held; that, shortly thereafter, Chief Justice BEN F. OVERTON came by them on his way to the reception; and that, after being introduced to Attorneys Edgar A. Brown and Vincent Lloyd and shaking hands with Attorney Raymond E. Ford, he repeated, almost word for word, what he had said in the above-described conversation in the Courtroom.

Affiant further says that there is absolutely no question in his mind that Chief Justice BEN F. OVERTON knew, at that time, that he was an heir at law of PERRY CARLTON, deceased, and one of the Petitioners upon the Petition for a Writ of Certiorari upon which oral argument was to be heard before the Supreme Court of Florida on April 11, 1978, and that he knew that Raymond E. Ford was of counsel for the Petitioners therein.

Affiant further says that he has reason to believe and fear and does believe and fear that he and the other Petitioners have not had a fair and impartial hearing and determination upon the appeal to the Fourth District Court of Appeal of Florida, because of the actions of Chief Justice BEN F. OVERTON; that he and the other Petitioners have not had a fair and impartial hearing and determination upon their Petition for a Writ of Certiorari before Justice BEN F. OVERTON as Chief Justice and a Justice of the Supreme Court of Florida; that he and the other Petitioners have, therefore, been deprived of their properties and possession of their properties, in an amount in excess of $600,000.00 to be distributed to Respondent, LUCY JANE CARLTON ROGERS, from the Estate of PERRY CARLTON, deceased, without due process of law under the Constitution of the

State of Florida, and the Constitution of the United States of America.

And further Affiant sayeth not.

_____
CHARLES H. CARLTON

Sworn to and subscribed before me at Fort Pierce, Flroida on this 26th day of March, 1979.

_____
Notary Public, State of Florida at Large

My commission expires: _____

AFFIDAVIT

STATE OF FLORIDA)
)
COUNTY OF ST. LUCIE)

Before me, a Notary Public in and for the State of Florida, an officer authorized to administer oaths, personally appeared EDGAR A. BROWN, who, being first duly sworn, deposed and said: That he is a practicing attorney in St. Lucie County, Florida; that he appeared in the Supreme Court Building of the Supreme Court of Florida, Tallahassee, Florida, on the 11th day of April, 1978, for the Investiture of Justice JAMES E. ALDERMAN as a Justice of the Supreme Court of Florida; that, after the Investiture of Justice JAMES E. ALDERMAN, on the morning of April 11, 1978, he was standing in the hallway near the North door of the lawyers' lounge with Charles H. Carlton, Attorney Raymond E. Ford, Attorney

Vincent Lloyd, and other persons, when Chief Justice BEN F. OVERTON approached the group, shook hands, exchanged pleasantries and spoke of Benjamin A. Bittan, Jr., of the law firm of Willes, Bittan & Willes, Fort Pierce, Florida; that, during the conversation, Chief Justice BEN F. OVERTON stated that Benjamin A. Bittan, Jr., was the best friend that he ever had; that Benjamin A. Bittan, Jr., had been his campaign manager in the Fort Pierce area during his campaign for election to the Supreme Court of Florida; that Benjamin A. Bittan, Jr., had been best man at his wedding, or vice versa; and that they visited each other back and forth.

Affiant further says that he has no interest in these proceedings although he has represented two of the Petitioners herein in the course of his law practice and that Affiant is executing this Affi-

davit upon the request of Charles H. Carlton.

Affiant further says that if Benjamin A. Bittan, Jr., is directly or indirectly representing the interests of LUCY JANE CARLTON ROGERS, then, in his opinion, Justice BEN F. OVERTON should disqualify himself as a member of the Supreme Court of Florida from sitting as a member thereof upon the hearing of and determination of the Petition for Rehearing, in Case No. 51,413, Supreme Court of Florida, now pending as filed by Petitioners therein, in the interest of fairness, impartiality, and due process of law.

EDGAR A. BROWN

Sworn to and subscribed before me at Fort Pierce, Florida, on this 26th day of March, 1979.

Notary Public, State of Florida at Large

My commission expires: _____

AFFIDAVIT

STATE OF FLORIDA)
)
COUNTY OF ST. LUCIE)

Before me, a Notary Public in and for the State of Florida, an officer authorized to administer oaths, personally appeared VINCENT LLOYD, who, being first duly sworn, deposed, and said: That he is a practicing attorney in St. Lucie County, Florida; that he appeared in the Supreme Court Building of the Supreme Court of Florida, Tallahassee, Florida, on the 11th day of April, 1978, for the Investiture of Justice JAMES E. ALDERMAN as a Justice of the Supreme Court of Florida; that, after the Investiture of Justice JAMES E. ALDERMAN, on the morning of April 11, 1978, he was standing in the hallway near the North door of the lawyers' lounge with Charles H. Carlton, Attorney Raymond E. Ford,

Attorney Edgar A. Brown, and other persons, when Chief Justice BEN F. OVERTON approached the group, shook hands around, and spoke of Benjamin A. Bittan, Jr., of the law firm of Willes, Bittan & Willes Fort Pierce, Florida; that, during the conversation, Chief Justice BEN F. OVERTON stated that Benjamin A. Bittan, Jr., was the best friend that he ever had; that Benjamin A. Bittan, Jr., had been his campaign manager in the Fort Pierce area during his campaign for election to the Supreme Court of Florida; that Benjamin A. Bittan, Jr., had been best man at his wedding; that they visited each other back and fort; and that the law firm of Willes, Bittan & Willes was in a bad condition and needed help, due to the terrible tragedy that had happened there (the death of William F. Willes).

Affiant further says that, in his opinion, Justice BEN F. OVERTON should

disqualify himself as a member of the Supreme Court of Florida from sitting as a member thereof upon the hearing of and determination of the Petition for Rehearing, in Case No. 51,413, Supreme Court of Florida, now pending, as filed by Petitioners therein, in the interest of fairness, impartiality, and due process of law.

_____

VINCENT LLOYD

Sworn to and subscribed before me at Fort Pierce, Florida, on this 26th day of March, 1979.

_____

Notary Public, State of Florida at Large

My commission expires: _____

THE MIAMI HERALD
FLORIDA REPORT

Thursday, March 8, 1979

Hatchett Tops List For Post

By John McDermott
Herald Political Writer

Joseph W. Hatchett, Florida's first black Supreme Court justice, heads a federal Justice Department list for a seat on the Fifth U.S. Court of Appeals, it was learned Wednesday.

Hatchett's appointment wasn't officially announced, but reliable sources said he is undergoing a background security check before his name is sent to the Senate by President Carter.

Hatchett, 46, is reportedly the first person tapped for one of 11 vacancies on the appellate court based in New Orleans.

ELI FEINBERG, chief administrative assistant to Sen. Richard Stone said the Justice Department hadn't notified Stone of any decision on Hatchett or nine other Floridians whose names were submitted for consideration.

"We have been told that (the) Justice (Department) is very, very impressed with Hatchett's qualifications... that he is high on the list and getting serious consideration," Feinberg said.

Hatchett would be the first black appellate judge in the Southern Region.

The customary procedure is for the Justice Department to make a background check on presidential appointments prior

to the names being sent to the Senate for confirmation. Usually senators from the appointees' home states are notified.

FLORIDA reportedly will get two or three of the 11 vacancies.

Other Floridians on the list include former Attorney General Robert Shevin, of Miami; U.S. District Judges James Lawrence King, C. Clyde Atkins and Joe Eaton, all of Miami; State Appellate Judge Robert P. Smith Jr., Jacksonville; State Appellate Judge Stephen Grimes, Lakeland; Public Service Commission Chairman Robert Mann, Tallahassee; lawyer Thomas A. Clark, Tampa; and U.S. District Judge John H. Reed, Jr., of Orlando.

Stone and Sen. Lawton Chiles will decide this week who will be named to those district judgeships. They will have an "open" meeting when making their selections.

SUPREME COURT OF FLORIDA

No. 51,413

IN RE: ESTATE OF PERRY CARLTON, DECEASED.

ALBERTA CARLTON HAYES, RUBY C. TEAGUE, CHARLES H. CARLTON, et al., Petitioners,

vs.

LUCY JANE CARLTON ROGERS, Respondent.

[January 10, 1980]

PER CURIAM.

Petitioners have requested the disqualification of Justice Overton from participation in the decision on rehearing in this case, based on sections 38.02 and 38.10, Florida Statutes (1977), and Canon 3C(1) of Florida's Code of Judicial Conduct.

This Court's procedural treatment of requests for disqualification has not always been consistent. In two cases the non-challenged members of the Court ruled on the legal sufficiency of the request. Ervin v. Collins, 35 So.2d 833 (Fla.1956); Ball v. Yates, 158 Fla. 521, 29 So.2d 729, cert. denied, 322 U.S. 774 (1947). More recent cases, however, have left the determination of disqualification to the discretion of the justice sought to be disqualified. Daytona Beach Racing & Recreational Facilities District v. Volusia County, 372 So.2d 417 (Fla. 1978); Department of Revenue v. Golder, 322 So. 2d 417 (Fla. 1975); Department of Revenue v. Leadership Housing, Inc., 322 So.2d 7 (Fla. 1975), cert. denied, 434 U.S. 805 (1977).

Without expressing any opinion as to the overall legal sufficiency of the petitioners' request, their reliance on

sections 38.02 and 38.10 is misplaced. These provisions, as framed, apply only to trial judges and not appellate judges. See Department of Revenue v. Golder, 322 So.2d 1, 4 n.15 (Fla. 1975) ("Florida's disqualification statutes are not involved in this proceeding in any way."). Moreover, the statutes include no evidence of any legislative intent to the contrary. Cf. 28 U.S.C. § 455 (1976) (revised in 1948 so as to extend to United States justices as well as judges).

After due consideration, we now recede from Ervin and Ball and hold that each justice must determine for himself both the legal sufficiency of a request seeking his disqualification and the propriety of withdrawing in any particular circumstances. This procedure is in accord with the great weight of authority,* and it reenforces the modern view of disqualification as a matter which is

"personal and discretionary with individual members of the judiciary . . . . " Department of Revenue v. Leadership Housing, Inc., 322 So.2d 7, 9 (Fla. 1975).

Petitioners' request for disqualification will be submitted to Justice Overton for his decision.

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* See, e.g., Laird v. Tatum, 409 U.S. 824 (1972); Berger v. United States, 255 U.S. 22 (1921); Shadid v. Oklahoma City, 494 F.2d 1267 (10th Cir. 1974); Grimes v. United States, 396 F.2d 331 (9th Cir. 1968); Hawaii-Pacific Venture Capital Corp. v. Rothbard, 437 F. Supp. 230 (D. Hawaii), appeal dismissed, 546 F.2d 1343 (9th Cir. 1977); Frank, Disqualification of Judges for Bias or Prejudice--A New Approach, 1972 Utah L. Reb. 377; Frank, Disqualification of Judges, 56 Yale L.J. 605 (1947); Note, State Procedures for Disqualification of Judges for Bias and Prejudice, 42 N.Y.U. L. Rev. 484 91967).

ENGLAND, C.J., ADKINS, BOYD, SUNDBERG and McDONALD, JJ. and MELVIN, Associate Justice, Concur

OVERTON, J., not participating in Per Curiam

DENIAL OF REQUEST FOR RECUSAL

OVERTON, J.

Pursuant to sections 38.02 and 38.10, Florida Statutes (1977), and the Code of Judicial Conduct, Canon 3(C) (1), petitioners filed a suggestion that I disqualify myself or be disqualfied from this cause on the grounds of my close friendship with a lawyer whose law firm had represented the respondent, the administrator of the estate in issue, but who are not attorneys of record in this cause. The knowledge of that personal friendship was known at the time of the second oral argument of this cause on April 11, 1978. The suggestion for disqualification, however, was not filed until March 27, 1979, after this Court had rendered its decision with my participation but while the matter was still pending for rehearing.

In accordance with the procedure established by this Court in Ball v. Yates, 158 Fla. 521, 29 So. 2d 729 (1947), and Ervin v. Collins, 85 So. 2d 833 (Fla. 1956). I submitted this suggestion for disqualification to the remaining members of this Court assigned to hear the merits of this cause without my participation and agreed to abide by their decision.

In Ball a suggestion to disqualify Justices Buford and Adams was made on the grounds that: (1) Justice Buford was friends with an attorney previously employed by the prevailing party, and (2) Justice Adams had financial dealings with a bank controlled by the prevailing party. As in the instant case, the unseccessful party filed the suggestion after the Court's opinion was rendered and while the matter was pending on rehearing. Justices Buford and Adams voluntarily submitted the issue of disqualification

to the remaining members of the Court. A special panel of the Court held that the suggestion was "in fact and in law . . . inadequate and insufficient in substance." 158 Fla. at 532, 29 So. 2d at 735. The Court stated that when no disqualification is shown, the matter of voluntary recusal is for the individual justice to determine. Both justices declined to recuse themselves and participated in the denial of the petition for rehearing.

In Ervin, a suggestion to disqualify Justices Thomas, Thornal, and O'Connell was made on the grounds that: (1) Justice Thomas and Governor Collins and their families "are close, intimate, and personal friends, and have been for many years," and (2) Justices Thornal and O'Connell were appointed by Governor Collins and were "strong personal and political friend(s) of the Governor." Id. at 833. A special panel of the

Supreme Court held that the allegations in the suggestion were "not legally sufficient to constitute a basis for disqualification," but instead could be considered as being addressed to the "conscience of the respective Justices against whom the suggestions are directed." Justices Thomas, Thornal, and O'Connell declined to recuse themselves in the cause and participated on the merits. See Ervin v. Collins, 85 So. 2d 852 (Fla. 1956).

Upon my submission of this matter, the Court receded from the procedure of Ball and Ervin and expressly found that sections 38.02 and 38.10, Florida Statutes (1977), were not applicable to appellate judges or justices. The Court stated it is a matter which is personal and discretionary with the individual judge or justice and thus resubmitted the matter to me for my determination.

The suggestion that a judge or justice disqualify himself presents a sensitive and difficult problem because the issue concerns the integrity of the Court and the resulting credibility of the judicial system as a whole. The instant case poses an even greater problem because the suggestion for disqualification was made eleven months after the petitioners had knowledge of the alleged grounds for disqualification and after the decision of the Court was rendered for a second time.

In reaching my determination, two questions must be considered: (1) whether the suggestion was timely filed, and (2) even if timely filed, whether the asserted circumstances of personal friendship are sufficient to require disqualification.

For the reasons which follow, I find that this suggestion for disqualification is legally insufficient and therefore

must be denied.

Timeliness

The suggestion for disqualification asserts that I should disqualify myself because of my "extremely close association and friendship with Benjamin A. Bittan, Jr., Esquire, a member of the law firm of Willes, Bittan, and Willes, Fort Pierce, Florida, the actual attorneys from [sic] the Respondent, Lucy Jane Carlton Rogers, although not presently her attorneys of record herein." The record reflects that Mr. Willes was the firm representative in all matters pertaining to the estate and Mrs. Rogers although he received advice from his partner, B. A. Bittan, Jr. It further reflects that B. A. Bittan was best man in Justice Overton's wedding and that a close friendship has been continually maintained. The facts asserted by petitioners also reflect (1) Raymond E.

Ford, one of the Counsel for petitioners, had knowledge of Justice Overton's close relationship with B. A. Bittan at a time prior to this cause being filed initially in this Court, and (2) petitioner Charles H. Carlton had knowledge of Justice Overton's close relationship with B. A. Bittan at the time of the oral argument of this cause on April 11, 1978. The Court denied certiorari on March 8, 1979, approximately eleven months after oral argument. A Petition for Rehearing was filed on March 21, 1979, and on March 27, 1979, this suggestion for disqualification was filed.

It is a general rule of law that a party waives any grounds for disqualification of a judge or justice when the suggestion is not filed within a reasonable period of time after having knowledge of such grounds. The purpose of this timeliness requirement is to avoid the adverse effects on the other litigant and

the problems of a retrial with its resulting costs and delay. Allowing a party to request disqualification after a decision has been rendered by the Court provides a second opportunity to achieve a favorable result when the first decision is adverse, an opportunity not available to the oposing party. Because of these factors, this rule of law has been strictly enforced in situations where there is knowledge of the gorund for disqualification before a decision but the suggestion for disqualification is not filed until after the court's decision is rendered. This general rule of law is reflected in part in the following cases: Oppenheimer v. Deutchman, 270 P. 2d 52 (Cal. Ct. App. 1954) (statement alleging bias and predjudice of a judge filed after rendition of judgment was filed too late to be considered); State ex rel. Rathe v. Jefferson Parish School

Board, 19 So. 2d 153 (La. 1944) (a motion to recuse a supreme court justice on rehearing was untimely where the party and her counsel participated in the original hearing with knowledge of facts on which the motion to recuse was based); City of Biloxi v. Cawley, 332 So. 2d 749 (Miss. 1976) (trial judge did not err in refusing to recuse himself where the motion suggesting recusal was not made until after the final decree was entered); Broad Street Corporation v. Velco Mortgage Co., 135 N.J. Eq. 581, 39 A.2d 700 (1944), aff'd, 136 N.J. Eq. 515, 42 A.2d 705 (1945) (objections to the trial judge were not timely where they were not made until after the judge had rendered his decision); State v. Cline, 366 P.2d 441 (n.M. 1961) (affidavid of disqualification was not timely filed when made after the district judge had judicially rejected requests made by a defendant in a criminal case).

In our own state, sections 38.02 and 38.10, Florida Statutes (1977), pertaining to the disqualification of trial judges, codify this general rule of law. Section 38.02 requires that a suggestion for disqualification must be filed not more than thirty days after the plaintiff's attorney has learned of such grounds of disqualification. Section 38.10 requires that the affidavit of disqualification be filed not less than ten days before the beginning of the term of court. In Data Lease Financial Corporation v. Blackhawk Heating & Pacific Co., Inc., 325 So. 2d 475 (Fla. 4th DCA 1975), the district court held under the authority of section 38.10 that a motion to disqualify was not timely filed where the plaintiff had waited until after an unfavorable ruling to request the trail judge's recusal.

Given the clear authority of this general rule of law, I find this request for disqualification was waived by the petitioners' delay in submitting the suggestion until after this Court ruled on the cause.

Sufficiency

Even assuming the suggestion was timely filed, it appears clear that friendship with a lawyer whose law firm represents one of the parties but in not counsel of record in the cause does not in and of itself require disqualification of a judge or justice.

In Ervin v. Collins and Ball v. Yates, this Court held that personal friendship with an attorney or a party to the cause, or an attorney who had represented a party, was not sufficient to constitute a legal basis for disqualification.

Canon 3(C)(1) of the Code of Judicial Conduct,[1] adopted in 1973, pertains to the disqualification of a judge and states in part: "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned." In interpreting this provision, opinions rendered by judicial conduct committees have concluded that, absent some special circumstance, friendly relationships between judges and attorneys do not of themselves require disqualification.

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1 Canon 3(c)(1) read in full:

A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer has been a material witness concerning it;

(c) he knows that he individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.

(d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding.

None of the special instances set forth in the canon are applicable to the instant suggestion for disqualification.

The Committee on the Code of Judicial Conduct for United State Judges, in advisory opinion 11, had presented to it a situation where an attorney was a longtime friend of the judge and godfather of one of the judge's children. The judge asked the committee whether he should disqualify himself from cases where a party is represented by a member of this attorney's firm. The committee answered as follows:

The question regarding members or associates of the firm of the friend and godfather poses no problem. It cannot be that firms are precluded from practice before judges simply because member have judges for friends. Here again there may be special circumstances dictating disqualification, but a friendly relationship is not sufficent reason in itself.

In a related matter, Florida's Committee on Standards of Conduct Governing Judges, in its opinion 76-12, stated that a judge need not disqualify himself from cases of a law firm which employs the judge's son as a nonlegal employee in a nonlawyer, nondiscretionary position.

If friendship alone with a lawyer or member of a firm is a basis for disqualification, then most judges in rural and semi-rural areas and many in metropolitan areas would be subject to disqualification in a large number of cases.

In the instant case, one of the attorneys of record for the petitioners is a former justice of this Court and has

personal friendships among the present members of this Court. That situation alone does not require members of this Court to disqualify themselves when his law firm brings matters before this Court for decision. The instant case is in fact more remote since the lawyer is neither counsel of record in the cause or the principle lawyer representing the party in other legal matters. I conclude that my disqualification is not required by either the law or the canons for judicial conduct.

Even though a suggestion for disqualification is legally insufficient, a judge may still voluntarily recuse himself if he believes it would be in the best interests for the administration of justice. Voluntary recusation has limited availability when, as in the instant case, disqualification is requested by an unsuccessful litigant after a judge or

justice has participated in the decision adverse to the requesting party. To do so would adversely and unjustly affect the successful party in the cause. Voluntary recusation after the rendition of judgment would be justifiable only when the judge or justice honestly believes he or she can no longer fairly and impartially rule on the cause.

I believe that I can continue to properly consider the issues in this cause fairly and impartially, and, consequently, I have a duty not to recuse myself. To do otherwise would set a dangerous precedent.

SUPREME COURT OF FLORIDA

THURSDAY, JANUARY 10, 1980

IN RE: ESTATE OF PERRY CARLTON, DECEASED.

ALBERTA CARLTON HAYES, RUBY C. TEAGUE, CHARLES H. CARLTON, et al.,

v.

LUCY JANE CARLTON ROGERS, Respondent.

CASE NO. 51,413

4th DCA CASE NO. 75-1874

Upon consideration of the Petition for Rehearing filed by attorneys for petitioners, and reply thereto,

IT IS ORDERED by the Court that said petition be and the same is hereby denied.

ENGLAND, C.J., OVERTON, SUNBERG and McDONALD, JJ., Concur ADKINS and BOYD, JJ. and MELVIN, Associate Justice, Dissent

A True Copy
TEST:

Sid J. White
Clerk Supreme Court.

IN THE SUPREME COURT OF FLORIDA

TUESDAY, JANUARY 22, 1980

IN RE: ESTATE OF PERRY CARLTON, DECEASED.

ALBERTA CARLTON HAYES, RUBY C. TEAGUE, CHARLES H. CARLTON, et al.,

Petitioners

vs.

LUCY JANE CARLTON ROGERS,

Respondent.

CASE NO. 51,413

DCA CASE NO. 75-1874

The motion for stay filed by attorneys for petitioners is granted and proceedings in this Court, the District Court of Appeal, Fourth District, and the Circuit Court of the Nineteenth Judicial Circuit in and for St. Lucie County, Florida, are hereby stayed to and including February 11, 1980, to allow petitioners to seek review in the supreme Court

of the United States and obtain any further stay from that Court.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

Supreme Court, U.S.
FILED
MAY 28 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1548

IN RE: ESTATE OF PERRY CARLTON, Deceased,

ALBERTA CARLTON HAYES,
RUBY C. TEAGUE,
CHARLES H. CARLTON, *et al.*,
Petitioners,

v.

LUCY JANE CARLTON ROGERS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

H. MICHAEL MADSEN
ROBERT S. GOLDMAN
THOMPSON, MESSER,
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1548

IN RE: ESTATE OF PERRY CARLTON, Deceased,

ALBERTA CARLTON HAYES,
RUBY C. TEAGUE,
CHARLES H. CARLTON, *et al.*,
Petitioners,

v.

LUCY JANE CARLTON ROGERS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, LUCY JANE CARLTON ROGERS, respectfully prays that this Court deny the petition for writ of certiorari, seeking review of the decisions of the Supreme Court of Florida in this case, reported at 378 So. 2d 1212 (1980).[1]

[1] In this brief, references to the Appendix to the Petition are designated [Pet. App. ___]. References to Respondent's Appendix are designated [A. ___].

JURISDICTION

Petitioners seek to invoke this Court's certiorari jurisdiction pursuant to 28 U.S.C. § 1257(3). Respondent submits that Petitioners have not specially set up or claimed a substantial federal question so as to permit them to seek review here. Their constitutional claim was not raised in timely fashion under Florida law, was not addressed below, and is insubstantial.

QUESTIONS PRESENTED

The "Questions Presented for Review" set forth in the Petition are not supported by the record. The facts of this case do not present a substantial federal question.

STATEMENT OF THE CASE

Respondent accepts Petitioners' Statement of the Case with the following additions and corrections:

1) Nothing in the record of this cause suggests that any Florida judge or justice was biased against Petitioners, or that there was any impropriety in the Florida appellate proceedings below;

2) B. A. Bittan, Jr., did not represent the Respondent, Mrs. Rogers, in the trial or appellate proceedings below, and his law firm has no interest in the resolution of this controversy [A.1];

3) Justice Ben Overton of the Florida Supreme Court did not assign Judges Robert P. Smith, Jr., and Warren H. Cobb to sit on the state's Fourth District Court of Appeal "to hear oral argument in [this] cause", as stated in the Petition. He assigned them to hear and determine whatever causes were presented to them during a three day period, two months following the dates of the assignments [Pet. App. 85-88];

4) Petitioners' assertion that "qualified judges of the Fourth District were available" to hear this case is not supported by the record;

5) Petitioners raised no objection in Florida's Fourth District Court of Appeal to any of the three judges on the panel which heard this case. They first complained about the temporary assignments of Judges Smith and Cobb in their Suggestion for Disqualification of Justice of Supreme Court (hereafter "Suggestion"), filed nearly two and one-half years following oral argument in the Fourth District, and two years after that court's decision had become final with the denial of Petitioners' request for rehearing;

6) Petitioners' recitation concerning the holdings in *In re Hewett's Estate*, 153 Fla. 137, 13 So. 2d 904 (1943), and other cases merely represents as fact Petitioners' position on the ultimate state law issue in this case, a position rejected by Florida's appellate courts;

7) The certiorari jurisdiction of the Florida Supreme Court to resolve conflicts between appellate decisions is found in Article V, Section 3(b)(3), Florida Constitution, not Section 4;

8) The Florida Supreme Court did not depart from its modern practice in submitting Petitioners' Suggestion to Justice Overton for decision.

In addition to the Statement of the Case, other sections of the Petition contain inaccurate or misleading factual assertions. For ease and clarity of expression, such matter is addressed in the section of this Brief entitled "Reasons for Denying the Writ."

REASONS FOR DENYING THE WRIT

Petitioners have no legitimate basis for seeking to invoke this Court's jurisdiction. Having lost a case involving a pure issue of state law, they now attempt to create a federal question by attacking the processes and judges which produced the adverse ruling. On the basis of factual inferences which are not supported by the record, Petitioners contend they were denied due process because the Chief Justice of the Florida Supreme Court declined their untimely suggestion that he disqualify himself in this case. The actual facts of record present no substantial federal question, and the petition for certiorari should be denied.

I.

THE RECORD DOES NOT PRESENT THE FEDERAL QUESTIONS WHICH THE PETITION ATTEMPTS TO RAISE

The factual predicate for Petitioners' "Questions Presented for Review" consists exclusively of inferences which are not supported by the record, to wit:

1) that Respondent, Mrs. Rogers, was represented in the proceedings below by an attorney (B. A. Bittan, Jr.) who is a close friend of Justice Ben Overton of the Florida Supreme Court (Petitioners' Question One);

2) that Justice Overton, as Chief Justice,[2] assigned two judges to Florida's Fourth District Court of Appeal in order to "fix" that court's decision, and that he then frustrated Petitioners' attempt to secure review in the Florida Supreme Court (the "special circumstances" cited in Petitioners' Question One);

[2]The Florida Supreme Court elects its Chief Justice every two years. Rule 2.030, Florida Rules of Judicial Administration.

3) that the proceedings in the Florida Supreme Court in this case were unusual, departing from prior practice and "arbitrarily" depriving Petitioners of a state constitutional right to review (Petitioners' Question Two).

First, Mrs. Rogers has never been represented by Mr. Bittan in this case. In 1970, another member of his law firm filed a *pro forma* petition on her behalf, with the consents of a majority of the other heirs, seeking the appointment of a bank to administer the estate of Perry Carlton. Mrs. Rogers did not have need for further legal assistance concerning the estate until July, 1975, when Petitioners filed a pleading seeking to prevent her from inheriting her share. Mr. Bittan's partner, who had been representing the bank, assisted her in securing counsel.[3]

Neither Bittan's firm nor its client, the bank, participated in the Florida appellate proceedings in issue, nor were they financially interested in the result.[4] Indeed,

[3]The Suggestion for Disqualification was filed in the court below with twelve exhibits attached. Six are included in Petitioners' Appendix. The omitted exhibits contain the facts which are set forth in the text above, and from which Petitioners draw their inferences.

[4]Paragraph (n) of Petitioners' Suggestion for Disqualification states that Mr. Bittan "personally and actively participated in the representation of LUCY JANE CARLTON ROGERS and the FIRST NATIONAL BANK OF FORT PIERCE, Fort Pierce, Florida, as Administrator of the Estate of PERRY CARLTON, deceased, as shown by his sworn testimony given by deposition upon oral examination on the 1st day of February, 1979" [Pet. App. 76-77]. This is inaccurate. Mrs. Rogers was not mentioned during Mr. Bittan's deposition.

In his opinion declining to recuse himself, Justice Overton incorrectly described Mrs. Rogers as "the administrator of the estate in issue". Justice Overton was concerned primarily with the legal sufficiency of the Suggestion, rather than its factual basis, and he may have misinterpreted paragraph (n). Mrs. Rogers was never the administrator.

on the day of oral argument in the Florida Supreme Court, when Petitioners claim they learned of Justice Overton's friendship with Mr. Bittan, the latter's firm was no longer representing any party to the estate proceeding, having withdrawn as counsel for the bank some six months earlier. There is absolutely no basis for Petitioners' attempt to portray Bittan and his firm as Mrs. Rogers' lawyers, or as a surreptitious link with Justice Overton.

Petitioners' second inference—that Justice Overton prearranged the decision of the Fourth District Court of Appeal by hand-picking Judges Robert Smith and Warren Cobb to decide the case against them—is absolutely unwarranted. Temporary assignment of judges to other courts is routine in Florida, despite Petitioners' attempt to create the impression that the assignments in this case were irregular. *See* Rule 2.1a(3), (4), Florida Rules of Appellate Procedure, 1962 Revision (in effect at all times material hereto).

Nothing in the record suggests that Justice Overton has less integrity than the late Justice Glenn Terrell, whom Petitioners quote at length. There is no evidence warranting the inference that Justice Overton was biased against Petitioners, and their insinuation that he orchestrated a statewide judicial conspiracy to defeat them is scandalous and impertinent.[5]

Petitioners' third inference is that the proceedings in the Florida Supreme Court were somehow unusual. Petitioners portray the court's action on their Suggestion

[5]The Suggestion for Disqualification of Justice Overton is Petitioners' second such pleading in this cause. Previously, they requested the disqualification of the trial judge. He denied their request, subsequently ruled in their favor on the merits, and is now described in their Petition as "the able Probate Judge".

for Disqualification as an abrupt departure from prior practice, and characterize the court's refusal to take jurisdiction of this case as an "arbitrary disregard of a right granted by" the Florida Constitution [Petition p. 5].

Submitting the Suggestion to Justice Overton for decision was not a change in the court's procedure. Although the court stated in its January 10, 1980 opinion that it was "receding" from early decisions in which the non-challenged members of the court ruled on the legal sufficiency of such a request, an examination of the entire opinion reveals that the court's actions in this case followed its well-established modern practice and the practice of this Court [Pet. App. 106, 108].

Further, the Florida Supreme Court did not disregard any state constitutional right secured to Petitioners. They have no "constitutional right of review" in that tribunal, as they claim. The writ of certiorari in cases of direct conflict between Florida appellate decisions is discretionary. Article V, Section 3(b)(3), Florida Constitution; *Lake v. Lake*, 103 So. 2d 639 (Fla. 1958).

Petitioners' characterization of this case as presenting a "clear-cut" and "patent" case of conflict jurisdiction merely states their position, and ignores the special meaning of the term "direct conflict" in Florida law. *See Ansin v. Thurston*, 101 So. 2d 808 (Fla. 1958); *Mystan Marine, Inc. v. Harrington*, 339 So. 2d 200 (Fla. 1976).

A majority of the court considers dictum in a prior decision an insufficient basis for the exercise of conflict certiorari jurisdiction. Justice Adkins disagrees, *Ciongoli v. State*, 337 So. 2d 780 (Fla. 1976), as he did in the case at bar [Pet. App. 51]. There is nothing arbitrary,

insidious or unusual in the court's decision not to take jurisdiction in this case. Three justices, whose qualifications Petitioners do not challenge, rejected their assertions of "patent" conflict.

The Florida Supreme Court has the ultimate authority to decide the extent of its jurisdiction and the appropriate occasions to exercise it. *See, e.g.*, the concurring opinion of Chief Justice White in *Godchaux Co. v. Estopinal*, 251 U.S. 179, 181, 40 S. Ct. 116 (1919) ("the contention that a federal right was violated by the refusal of the [state] court to take jurisdiction is too unsubstantial and frivolous to give rise to a federal question").

In sum, the record does not contain the factual predicate Petitioners assert for their "Questions Presented for Review". Mr. Bittan was not "one of the attorneys in the case" before the Florida Supreme Court; the "special circumstances" of judicial impropriety and conspiracy are nonexistent; and the Florida Supreme Court did not by denying certiorari evince an "arbitrary disregard of a right guaranteed by the state constitution". Petitioners lost. That does not violate the Law of the Land.

II.

THE QUESTION PRESENTED BY THE PETITION AND SUGGESTION FOR DISQUALIFICATION WAS NOT TIMELY RAISED BELOW AND IS NOT SPECIALLY SET UP OR CLAIMED

Petitioners knew of the asserted ground for disqualification of Justice Overton on the day of oral argument in the Florida Supreme Court—a year before the court rendered its decision with Justice Overton's participation. They offer no explanation for waiting until after the decision to file their Suggestion for Disqualification. The Florida Supreme Court stressed the importance of timeliness in requesting disqualification in *Ball v. Yates*, 158 Fla. 521, 29 So. 2d 729 (1947), and Justice Overton properly concluded that Petitioners had waived the issue.

A failure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court, so long as the state has a legitimate interest in enforcing its procedural rule, *Henry v. Mississippi*, 379 U.S. 443, 85 S. Ct. 564 (1965). Florida clearly has a legitimate interest in requiring that challenges to its judges be asserted before they participate in decisions, and Petitioners do not contend to the contrary, *see Michigan v. Tyler*, 436 U.S. 499, 98 S. Ct. 1942 (1978), n.7. As Justice Overton pointed out in his opinion declining to recuse himself, any other rule gives the challenging party an unfair advantage:

> Allowing a party to request disqualification after a decision has been rendered by the Court provides a second opportunity to achieve a favorable result when the first decision is adverse, an opportunity not available to the opposing party. Because of these factors, this rule of law has been strictly enforced in situations where there is knowledge of

the ground for disqualification before a decision but the suggestion for disqualification is not filed until after the court's decision is rendered. [Pet. App. 116].

Thus, Petitioners' "federal question" was neither timely presented under state law nor addressed by the state court. It is therefore not "specially set up or claimed" so as to entitle Petitioners to invoke this Court's jurisdiction, 28 U.S.C. § 1257; *Godchaux Co. v. Estopinal*, 251 U.S. 179, 40 S. Ct. 116 (1919); *American Surety Co. v. Baldwin*, 287 U.S. 156, 53 S. Ct. 98 (1932) (federal claim first raised by petition for rehearing in state supreme court cannot serve as basis for invoking this Court's jurisdiction).

In the case at bar, Petitioners waited until after they had filed their petition for rehearing in the Florida Supreme Court before raising their federal question. Having knowingly accepted the risk of Justice Overton's participation, they cannot now attack the result.

III.

NEITHER THE RECORD NOR THE DECISION BELOW PRESENTS A SUBSTANTIAL FEDERAL QUESTION APPROPRIATE FOR DECISION BY THIS COURT

The facts of this case present no federal question. Once the inferences, innuendos, and misstatements with which Petitioners attempt to supplement the record are discarded, little remains but their professed fear that Florida's appellate courts denied them a fair hearing. They offer no legal analysis to support a federal question, relying instead upon Canon 3(C)(1) of Florida's Code of Judicial Conduct. Their repeated mechanical references to "due process" and their Questions Presented are

wholly formal, and so completely devoid of merit as to be frivolous. Petitioners cannot obtain relief in this Court. *Equitable Life Assurance Society v. Brown*, 187 U.S. 308, 23 S. Ct. 123 (1902).

In his written opinion declining to recuse himself, Justice Overton assumed the truth of Petitioners' contention that Mr. Bittan's firm represented Mrs. Rogers below. He did not address Petitioner's "due process" claim, but quoted from Advisory Opinion 11 of the Committee on the Code of Judicial Conduct for United States Judges, which concluded that friendship with an attorney whose firm represents a party does not disqualify a judge. If the Due Process Clause requires recusal in such cases, its standard must be more stringent than that of the Code. However, this proposition has been uniformly rejected by the authorities which have considered the question. *United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933, 97 S. Ct. 2641 (1977); *United States ex rel. Perry v. Cuyler*, 584 F.2d 644 (3d Cir. 1978), *cert. denied*, 440 U.S. 925, 99 S. Ct. 1257 (1979); *Disqualification of Federal Judges for Bias or Prejudice*, 46 U. Chi. L. Rev. 236 (1978).

Apart from the absence of a substantial federal question in this case, Respondent submits that the general subject of judicial qualifications does not presently warrant constitutional adjudication. As Justice Overton pointed out, the suggestion that a judge or justice disqualify himself "presents a sensitive and difficult problem" [Pet. App. 113]. Perhaps for this reason, the cases in which this Court has found the Due Process Clause implicated by a judge's participation have been limited to situations where the judge has a personal or official pecuniary interest in the result, such as *Tumey v.*

Ohio, 273 U.S. 510, 47 S. Ct. 437 (1927) (mayor-judge retained portion of fees collected from convictions), or where bias is obvious or practically unavoidable, as in *Mayberry v. Pennsylvania*, 400 U.S. 455, 91 S. Ct. 499 (1971) (judge who was "reviled by contemnor" could not preside in contempt proceedings). As this Court stated in *Tumey:*

> All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest would seem generally to be matters merely of legislative discretion. 273 U.S. at 523.

Petitioners offer nothing to suggest that the matter of judicial qualifications suddenly demands increased constitutional scrutiny. Such an endeavor would present this Court with the difficult problems of ascertaining the true facts in each case, developing meaningful standards for general application to myriads of situations, and defining the relationships between the constitutional standards and the various versions of the Code of Judicial Conduct. It would inevitably increase the number of petitions filed by litigants simply dissatisfied with lower court decisions, as in the case at bar. In the absence of evidence that the state and federal codes of judicial conduct are not effective, no necessity is presented for the Court to enter this arena.

CONCLUSION

This case involved a difficult question of state law. The judges were divided, but Petitioners lost. There has been no infringement of their constitutional rights, no disqualifying relationships, and no judicial conspiracy. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 23, 1980

Appendix

APPENDIX

IN THE
SUPREME COURT OF THE STATE OF FLORIDA

Case No. 51,413

IN RE:
ESTATE OF PERRY CARLTON, Deceased

ALBERTA CARLTON HAYES, RUBY C. TEAGUE, CHARLES H. CARLTON, *et al.*,

Petitioners,

v.

LUCY JANE CARLTON ROGERS,

Respondent.

REPLY TO SUGGESTION FOR DISQUALIFICATION OF JUSTICE OF SUPREME COURT

The following is a brief reply to the Suggestion for Disqualification of Justice of Supreme Court:

1. I was hired in this cause by Lucy Rogers, and I am to be paid by Lucy Rogers. I personally have handled all legal work on this matter and have never discussed or had any contact whatsoever with Benjamin A. Bittan, Jr. of Fort Pierce, Florida.

2. The firm of Willes, Bittan & Willes has no interest financially or otherwise in this cause.

3. It should be noted that no objection to any of the Judges of the District Court of Appeal of Florida, Fourth District, has ever been made by the Petitioners in over two and a half years since they heard the case. Further, no objection has been filed to any of the Justices of the Supreme Court, even though almost a year has elapsed since oral argument in this cause. The Petitioners appear to have merely awaited the Judgment, and did not like the decision and began attacking anyone and everyone.

4. As it relates to the Affidavit under oath of Charles H. Carlton filed in this cause in which he stated that Errol S. Willes went to the District Court of Appeal of Florida, Fourth District, and talked to some of the Judges at the time of oral argument, I argued the case that day and can state unequivocally that Errol S. Willes was not at the District Court of Appeal of Florida, Fourth District, nor to my knowledge was within Palm Beach County.

I hope the above is appropriate, and if more information is needed, I would be pleased to supply it upon request.

My attempt to be professional, ethical, and in good taste prevents me from fully stating my utter contempt for the document filed herein.

/s/ Robert Jackson
Jackson & Clem, P.A.
Post Office Box 2397
Vero Beach, Florida 32960
Attorneys for Respondent

Sworn to and subscribed before
me at Vero Beach, Florida, on
this 29th day of March, 1979.

/s/ Paula L. LaPorte
Notary Public
State of Florida at Large

My Commission Expires: 7/6/81

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to B. K. ROBERTS of the Law Firm of Roberts, Miller, Baggett, LaFace, Richard & Wiser, Post Office Box 1752, Tallahassee, Florida 32302; RAYMOND E. FORD, Post Office Box 3307, Fort Pierce, Florida 33450; JOHN T. BRENNAN of the Law Firm of Brennan, McAliley, Hayskar & McAliley, Post Office Box 3779, Fort Pierce, Florida 33450; ALBERTA CARLTON HAYES, Post Office Box 1781, Fort Pierce, Florida 33450; REUBEN W. CARLTON, Route 1, Box 714, Fort Pierce, Florida 33450; and, CHARLES H. CARLTON, 1118 Sunrise Boulevard, Fort Pierce, Florida 33450, this 29th day of March, 1979.

/s/ Robert Jackson
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